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UNITED STATES DISTRICT COURT  
For the Western District of Tennessee,  
Western Division.

ARTHUR GOLDBERG, Secretary of  
Labor, United States Department of  
Labor,

Plaintiff,

vs.

STEEPLETON GENERAL TIRE COM-  
PANY, INC., and A. E. STEEPL-  
TON,

Defendants.

No. 4344.  
Civil.

VOL. I.

**DOCKET ENTRIES.**

|          |          |   |
|----------|----------|---|
| October  | 13, 1961 | Filed Complaint   |
| November | 1, 1961  | Filed Answer of Defendant   |
| November | 2, 1961  | Filed Interrogatories by Defendants   |
| November | 4, 1961  | Filed Plaintiff's Interrogatories to Steepleton General Tire Company, Inc., Defendant |
| November | 13, 1961 | Filed Plaintiff's Objections to Defendant's Interrogatories                           |
| November | 13, 1961 | Filed Objections to Interrogatories by Defendant                                      |
| November | 24, 1961 | Filed Plaintiff's Reply to Defendant's Objections to Interrogatories                  |
| November | 30, 1961 | Filed Notice to Take Deposition Upon Oral Examination                                 |
| November | 30, 1961 | Filed Notice to Take Deposition Upon Oral Examination                                 |

*Docket Entries*

|          |          |  |
|----------|----------|--|
| December | 8, 1961  | Filed Notice to Take Depositions Upon Oral Examination                   |
| December | 8, 1961  | Filed Amended Notice to Take Depositions Upon Oral Examination           |
| December | 18, 1961 | Filed Notice to Take Depositions Upon Oral Examination by Plaintiff      |
| December | 22, 1961 | Filed Notice to Take Deposition Upon Oral Examination                    |
| January  | 5, 1962  | Filed Notice to Take Depositions upon Oral Examination—Mr. R. E. Hedlund |
| February | 20, 1962 | Filed Amendment to Complaint, Consented to by Defendant                  |
| February | 20, 1962 | Filed Answer to Amendment to Complaint, Consented to by Plaintiff        |
| February | 20, 1962 | Filed Motion for Production of Documents                                 |
| February | 23, 1962 | Filed Affidavit of James H. Micklish                                     |
| February | 23, 1962 | Filed Notice to Take Depositions Upon Oral Examination                   |
| February | 28, 1962 | Filed Request For Admission of Facts                                     |
| March    | 1, 1962  | Filed Order On Motion For Production of Documents                        |
| March    | 5, 1962  | Filed Objections to Requested Admission of Facts                         |
| March    | 5, 1962  | Filed Motion and Notice of Motion  |
| March    | 8, 1962  | Filed Supplemental Request for Admission of Facts                        |
| March    | 16, 1962 | Filed Motion and Notice of Motion  |

*Docket Entries*

|       |          |   |
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| March | 16, 1962 | Filed Objections to Supplemental Request for Admission of Facts   |
| March | 23, 1962 | Filed Order on Objections to Plaintiff's Request for Admission of Facts and Supplemental Request for Admission of Facts |
| March | 30, 1962 | Filed Replies to Request and Supplemental Request for Admission of Facts  |
| March | 30, 1962 | Filed Replies to Request and Supplemental Request for Admission of Facts  |
| May   | 11, 1962 | Filed Deposition of Winston W. Marsh  |
| May   | 11, 1962 | Filed Deposition of Reuben E. Hedlund   |
| May   | 11, 1962 | Filed Deposition of Milan Zaveson   |
| May   | 11, 1962 | Filed Deposition of Raymond L. Davis  |
| May   | 11, 1962 | Filed Deposition of E. A. Henderscheid  |
| May   | 11, 1962 | Filed Deposition of Ted Curry   |
| May   | 11, 1962 | Filed Deposition of Robert L. Sawyer  |
| May   | 11, 1962 | Filed Deposition of James Herman Micklish, Part 1   |
| May   | 11, 1962 | Filed Deposition of James Herman Micklish, Part 2   |
| May   | 21, 1962 | Filed Deposition of Mr. A. E. Steepleton  |



*Docket Entries*

|           |          |  |
|-----------|----------|--|
| May       | 23, 1962 | Filed Deposition of Miss Virginia Lauderdale   |
| July      | 27, 1962 | Filed Findings of Fact, Conclusions of Law and Order for Judgment  |
| July      | 31, 1962 | Filed Motion to Amend Findings of Fact, Conclusions of Law and Order for Judgment                          |
| July      | 31, 1962 | Filed Final Decree   |
| August    | 2, 1962  | Filed Order Amending Order for Judgment by Striking the Words "at the Plaintiff's cost" from Paragraph VII |
| September | 27, 1962 | Filed Notice of Appeal   |
| September | 27, 1962 | Filed Notice of Cross-Appeal as to Part of the Judgment  |
| September | 27, 1962 | Filed \$250.00 Appeal Bond   |
| October   | 22, 1962 | Filed Reporter's Transcript—7 Volumes  |

**Certificate.**

I, W. Lloyd Johnson, Clerk of the United States District Court for the Western District of Tennessee, do hereby certify that the above index of docket entries is a true and correct copy of all relevant docket entries which appear on the docket in this office.

This first day of November, 1962.

W. LLOYD JOHNSON,

Clerk,

By V. LaFON,

Deputy Clerk.

(Seal)

*Clerk's Certificate*

UNITED STATES DISTRICT COURT  
For the Western District of Tennessee,  
Western Division.

ARTHUR GOLDBERG, Secretary of  
Labor, United States Department of  
Labor,

Plaintiff,

vs

STEEPLETON GENERAL TIRE COM-  
PANY, INC., and A. E. STEEPLE-  
TON,

Defendants.

No. 4344.  
Civil.

**CLERK'S CERTIFICATE.**

I, W. Lloyd Johnson, Clerk of the United States District Court for the Western District of Tennessee, do hereby certify that the papers and exhibits transmitted herewith and enumerated below comprise the Record on Appeal in the above entitled matter.

1. Complaint
2. Answer of Defendant
3. Interrogatories by Defendants
4. Plaintiff's Interrogatories to Steepleton General Tire Company, Inc., Defendant
5. Plaintiff's Objections to Defendant's Interrogatories
6. Objections to Interrogatories by Defendant
7. Plaintiff's Reply to Defendant's Objections to Interrogatories
8. Notice to Take Deposition Upon Oral Examination

*Clerk's Certificate*

9. Notice to Take Deposition Upon Oral Examination
10. Notice to Take Depositions Upon Oral Examination
11. Amended Notice to Take Depositions Upon Oral Examination
12. Notice to Take Depositions Upon Oral Examination by Plaintiff
13. Notice to Take Deposition Upon Oral Examination
14. Notice to Take Depositions upon Oral Examination—Mr. R. E. Hedlund
15. Amendment to Complaint, Consented to by Defendant
16. Answer to Amendment to Complaint, Consented to by Plaintiff
17. Motion for Production of Documents
18. Affidavit of James H. Micklish
19. Notice to Take Depositions Upon Oral Examination
20. Request for Admission of Facts
21. Order on Motion for Production of Documents
22. Objections to Requested Admission of Facts
23. Motion and Notice of Motion
24. Supplemental Request for Admission of Facts
25. Motion and Notice of Motion
26. Objections to Supplemental Request for Admission of Facts
27. Order on Objections to Plaintiff's Request for Admission of Facts and Supplemental Request for Admission of Facts

*Clerk's Certificate*

28. Replies to Request and Supplemental Request for Admission of Facts
29. Replies to Request and Supplemental Request for Admission of Facts
30. Deposition of Winston W. Marsh, with exhibits attached
31. Deposition of Reuben E. Hedlund, with exhibits 1 through 4 attached
32. Deposition of Milan Zaveson, with exhibits 1 through 6 attached
33. Deposition of Raymond L. Davis, with exhibits 1 through 3 attached
34. Deposition of E. A. Henderscheid, with Firestone exhibits A through K attached
35. Deposition of Ted Curry, with B. F. Goodrich exhibits 1 through 10 attached
36. Deposition of Robert L. Sawyer
37. Deposition of James Herman Micklish, Part I, with exhibits 1 through 7 attached
38. Deposition of James Herman Micklish, Part II
39. Deposition of Mr. A. E. Steepleton
40. Deposition of Miss Virginia Lauderdale
41. Findings of Fact, Conclusions of Law and Order for Judgment
42. Motion to Amend Findings of Fact, Conclusions of Law and Order for Judgment
43. Final Decree
44. Order Amending Order for Judgment by Striking the Words "at the Plaintiff's cost" from Paragraph VII
45. Notice of Appeal

*Complaint*

46. Notice of Cross-Appeal as to Part of the Judgment

47. Reporter's Transcript—7 Volumes

In Witness Whereof, I have hereto subscribed my name and affixed the Seal of said Court at Memphis in said District, this 2nd day of November, 1962.

W. LLOYD JOHNSON,

Clerk,

By V. LaFON,

Deputy Clerk.

(Seal)

UNITED STATES DISTRICT COURT  
For the Western District of Tennessee,  
Western Division.

ARTHUR GOLDBERG, Secretary of  
Labor, United States Department of  
Labor,

Plaintiff,

vs.

STEEPLETON GENERAL TIRE COM-  
PANY, INC., and A. E. STEEPLE-  
TON,

Defendants.

Civil Action.  
File No. 4344.

**COMPLAINT.**

(Filed Oct. 13, 1961.)

I.

Plaintiff brings this action to enjoin the defendants from violating the provisions of Sections 15 (a) (1), 15 (a) (2)

*Complaint*

and 15 (a) (5) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, as amended, 29 U. S. C. 201, et seq.), herein after referred to as the Act.

II.

Jurisdiction is conferred upon the court by Section 17 of the Act and by Section 24 (8) of the Judicial Code, revised effective September 1, 1948, 28 U. S. C. 1337.

III.

The defendant Steepleton General Tire Company, Inc. is a corporation organized and existing under the laws of the State of Tennessee, having its principal office and place of business in Memphis, Shelby County, Tennessee, within the jurisdiction of this court, where it is engaged in the production, sale and servicing of new and recapped tires.

The defendant A. E. Steepleton, who resides in Memphis, Shelby County, Tennessee, within the jurisdiction of this court, is now and at all times hereinafter mentioned has been president of the defendant Steepleton General Tire Company, Inc., in which position he has actively managed and controlled the operations of the corporate defendant.

IV.

At all times hereinafter mentioned the defendants have employed and are employing approximately forty-seven (47) employees in the production, handling, servicing, selling and distributing of new and recapped tires. Substantial quantities of the tires produced, handled, serviced, sold and distributed by the defendants' said employees have been, and are being, produced for commerce as de-

*Complaint*

fined by the Act and have been, and are being, received, transported, offered for transportation, shipped, delivered and sold into and from states other than the State of Tennessee, and have been, and are being, shipped, delivered and sold with knowledge that shipment, delivery and sale thereof in commerce is intended from defendants' business premises in Tennessee to other states. By reason of their activities, as aforesaid, the defendants and their employees are engaged in commerce and in the production of goods for commerce as defined by the Act.

V.

During the period since May 1, 1959, the defendants repeatedly have violated and are violating the provisions of Sections 7 and 15 (a) (2) of the Act by employing many of their employees in commerce and in the production of goods for interstate commerce, within the meaning of the Act, for workweeks longer than forty (40) hours, without compensating the employees for such excess hours of employment at rates not less than one and one-half (1½) times the regular rates at which they are employed.

VI.

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11 (c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours and other conditions and practices of employment to be made, kept and preserved by every employer subject to any provision of the Act. The said regulations and amendments thereto were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

*Complaint*

VII.

During the period since May 1, 1959, the defendants, employers subject to the provisions of the Act, repeatedly have violated and are violating the provisions of Sections 11 (c) and 15 (a) (5) of the Act in that they have failed to make, keep and preserve adequate and accurate records of the wages, hours and other conditions and practices of employment maintained by them, as prescribed by the aforesaid regulations, with respect to their employees.

VIII.

During the period since May 1, 1959, the defendants have violated, and are violating, the provisions of Section 15 (a) (1) of the Act in that they have transported, offered for transportation, shipped, delivered or sold in commerce and have shipped, delivered or sold with knowledge that shipment, delivery or sale thereof in commerce was intended, from their said place of business to other states goods, to wit, tires, in the production of which many of their employees were employed in violation of Sections 6 and 7 of the Act, as alleged.

IX.

The defendants have, since May 1, 1959, repeatedly violated the aforementioned provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff prays judgment permanently enjoining and restraining the defendants, their officers, agents, servants, employees, attorneys and all persons acting or claiming to act in their behalf and interest, from violating the provisions of Sec.



*Complaint*

tions 15 (a) (1), 15 (a) (2) and 15 (a) (5) of the Act, and for such other and further relief as may be necessary or appropriate.

CHARLES DONAHUE,  
CHARLES DONAHUE,  
Solicitor,

JETER S. RAY,  
JETER S. RAY,  
Regional Attorney,

FRANCIS J. STEINER, JR.,  
FRANCIS J. STEINER, JR.,  
Attorney,

United States Department of Labor.

Post Office Addresses:

U. S. Department of Labor,  
Office of the Solicitor,  
725 U. S. Courthouse,  
801 Broad Street,  
Nashville 3, Tennessee,

or

U. S. Department of Labor,  
Office of the Solicitor,  
Washington 25, D. C.

*Answer*

UNITED STATES DISTRICT COURT  
For the Western District of Tennessee,  
Western Division.

ARTHUR J. GOLDBERG, Secretary of  
Labor, United States Department of  
Labor,

Plaintiff,

vs.

STEEPLETON GENERAL TIRE COM-  
PANY, INC., and A. E. STEEPLE-  
TON,

Defendants.

Civil Action.  
No. 4344.

**ANSWER.**

Come now the defendants, Steepleton General Tire Company, Inc., and A. E. Steepleton, and, for answer to the complaint herein, state:

(1) On information and belief defendants admit the allegations of Paragraph I of the complaint insofar as same pertain to plaintiff's purpose or object in filing his complaint.

(2) Defendants admit the allegations of Paragraph II of the complaint.

(3) Defendants admit their status, residency and relationship as alleged in Paragraph III of the complaint; defendants deny that Steepleton General Tire Company, Inc., hereinafter referred to as the Company, has been engaged in the production of goods as defined by the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 201 et seq.), hereinafter referred to as the Act, and deny all other allegations of paragraph III of the complaint.

*Answer*

(4) Defendants deny that the Company, at any time mentioned in the complaint, employed as many as forty-seven (47) employees in addition to its employees specifically excluded from coverage of Sections 6 and 7 of the Act by Sections 13 (a) (1), 13 (a) (2) or 13 (a) (4) thereof; deny that the Company engaged in the production of any goods for commerce as defined in the Act; deny that any substantial quantity of tires were sold or distributed by the Company in commerce as defined by the Act, and deny all other allegations of Paragraph IV of the complaint.

(5) Defendants deny that they violated Section 7 of the Act and therefore deny any violation of Section 15 (a) (2) thereof as alleged in Paragraph V of the complaint.

(6) Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph VI of the complaint that regulations were issued, promulgated, published and are known as there alleged, and strict proof thereof is demanded; defendants deny that said regulations affect or apply to the defendants or any other employer exempted or excluded from coverage by the Act by specific provisions thereof; deny that said regulations accurately reflect the section of the Act pursuant to which they were purportedly issued and therefore deny that said regulations are valid or were in fact or substance authorized by said Act.

(7) Defendants deny that they violated Section 11 (c) of the Act and therefore deny violation of Section 15 (a) (5) thereof as alleged in Paragraph VII of the complaint; defendants aver that the Company makes, keeps and preserves adequate, accurate payroll and other records with respect to its employees which comply fully with the requirements of all laws affecting, concerning or controlling defendants and aver that defendants are not

*Answer*

affected or controlled by Section 11 (c) of the Act, but are specifically exempted and excluded from coverage thereunder.

(8) Defendants deny that the Company has, during the period since May 1, 1959, engaged in the production of tires or other goods as defined by the Act; deny that the Company was covered by or could have violated Sections 6 and 7 of said Act during such period, deny that said sections apply to or affect the Company, therefore deny any violation of Section 15 (a) (1) of said Act as alleged in Paragraph VIII of the complaint; and deny all other allegations in the said Paragraph.

(9) Defendants deny all violations of provisions of the Act alleged in Paragraph IX of the complaint; deny that any section thereof authorizes any judgment against defendants; deny that complainant is entitled to any relief and deny that there is any basis upon which complainant should be granted any relief.

And now having answered the allegations of the complaint, defendants, without waiving but expressly relying upon all the above defenses and denials, also rely upon the following defenses:

(A) The Company is and during the period since May 1, 1959 has been engaged in the sale of new and recapped tires at retail.

(B) The Company is and at all times during such period has been an exempt "retail" establishment as defined in Section 13 (a) (2) of the Act; the Company at all such times has also qualified under Section 13 (a) (4) of the Act; therefore the provisions of Sections 6 and 7 of the Act relied upon by the plaintiff do not apply with respect to the Company.

*Answer*

(C) Section 13 (a) (2) of the Act provides in part that sales "recognized as retail sales or services in the particular industry" in which an employer is engaged shall be considered retail sales for purposes of this Section; Section 13 (a) (4) of the Act provides in part that the recognition of an employer "as a retail establishment in the particular industry" in which it is engaged shall determine whether a given employer qualifies as an exempt retail establishment for purposes of this Section. These mandatory provisions were ignored or violated when directives, bulletins and other publications by the Department of Labor, binding upon its agents and employees, were promulgated and published. Contrary to these provisions such bulletins and directives classify sales recognized as retail sales in the tire industry by vendors recognized as retail establishments in the tire industry as non-retail sales by non-retailers. Such bulletins and directives are contrary to the classifications recognized in the tire industry expressed by leaders in that industry at hearings preceding the publication of same. Such bulletins and directives are contrary to express legislative mandate and therefore are invalid. Pursuant to such invalid publications plaintiff's agents and employees conducted an extensive investigation of and made completely inaccurate and unwarranted findings in respect to the Company, which inaccurate, unwarranted and invalid findings serve as the basis for the complaint.

(D) Section 6 of the Act, also relied upon in the complaint, does not apply to the Company because it is exempt therefrom pursuant to Section 13 (a) (2) and because the minimum wage of \$1.00 per hour has been maintained by the Company.

(E) Section 11 (c) of the Act relied upon in the complaint applies only to employers subject to some other

*Answer*

provision of the Act or subject to some order issued thereunder; the defendants are not subject to any provision of the Act and are not the recipients of any order thereunder.

(F) These defendants have not violated those Sections of the Act which would make Sections 15 (a) (1), 15 (a) (2) or 15 (a) (5) thereof applicable as alleged in the complaint.

(G) In this suit plaintiff attempts to have this Court sanction and enforce invalid and illegal bulletins and directives which are contrary to and in violation of express, mandatory provisions in the sections of the Act to which such publications refer and by which plaintiff would have this Court believe such publications were authorized.

Wherefore, defendants pray that they be allowed to go hence with their proper costs.

BURCH, PORTER & JOHNSON,  
By TOM MITCHELL, JR.,  
Attorneys for Defendants.

I, Tom Mitchell, Jr., certify that the foregoing answer was served upon plaintiff by mailing copies, postage prepaid, to one of plaintiff's attorneys of record addressed as follows:

Jeter S. Ray, Regional Attorney  
U. S. Department of Labor  
Office of the Solicitor  
725 U. S. Courthouse  
801 Broad Street  
Nashville 3, Tennessee

This 1st day of November, 1961.

TOM MITCHELL, JR.,  
TOM MITCHELL, JR.

*Amendment to Complaint*

UNITED STATES DISTRICT COURT  
For the Western District of Tennessee,  
Western Division.

ARTHUR J. GOLDBERG, Secretary of  
Labor, United States Department of  
Labor, Plaintiff,

vs.

STEEPLETON GENERAL TIRE COM-  
PANY, INC., and A. E. STEEPLE-  
TON, Defendants.

Civil Action.  
No. 4344.

**AMENDMENT TO COMPLAINT.**

Pursuant to Rule 15 (a), Federal Rules of Civil Procedure, and by written consent of the defendants as evidenced by the endorsement of counsel hereon, the plaintiff amends his complaint heretofore filed by adding thereto immediately following Paragraph No. IV and immediately preceding Paragraph No. V the following:

**IV-A.**

Since September 3, 1961 the defendants repeatedly have violated and are violating the provisions of Sections 6 (a) (1) and 15 (a) (2) of the Act by paying to many of their employees employed in commerce and in the production of goods for commerce, as aforesaid, wages at rates less than one dollar and fifteen cents (\$1.15) an hour.

CHARLES DONAHUE,  
Solicitor,

JETER S. RAY,  
Regional Attorney,

MARVIN M. TINCER,  
Attorney,

United States Department of Labor,  
Attorneys for Plaintiff.

*Answer to Amendment to Complaint*

Defendants consent to the filing of the foregoing amendment by the plaintiff to the complaint in this cause.

BURCH, PORTER and JOHNSON,  
By TOM MITCHELL, JR.,  
Attorneys for Defendants.

UNITED STATES DISTRICT COURT  
For the Western District of Tennessee,  
Western Division.

ARTHUR GOLDBERG, Secretary of  
Labor, United States Department of  
Labor,

Plaintiff,

vs.

STEEPLETON GENERAL TIRE COM-  
PANY, INC., and A. E. STEEPLE-  
TON,

Defendants.

Civil Action.  
No. 4344.

**ANSWER TO AMENDMENT TO COMPLAINT.**

Come now the defendants and for answer to the Amendment to Complaint heretofore filed in this cause by plaintiff, state:

Defendants deny that since September 3, 1961 they have repeatedly violated and deny that they are violating Sections 6 (a) (1) and 15 (a) (2) of the Act, deny that employees of the corporate defendant are employed in commerce and deny that said employees are engaged in the production of goods for commerce. The corporate defendant is a retail establishment as defined in Section 13 (4) of the Act; it qualifies as same pursuant to Section 13 (a) (2) thereof. The provisions of Sections 6 and 15 of the



*Request for Admission of Facts*

Act relied upon by plaintiff in his Amendment to Complaint do not apply with respect to defendants.

Wherefore, defendants pray that they be allowed to go hence with their proper costs.

BURCH, PORTER & JOHNSON,  
By TOM MITCHELL, JR.,  
Attorneys for Defendants.

Plaintiff consents to the filing of the foregoing Answer to Amendment to Complaint by defendants; the undersigned attorney for plaintiff acknowledges receipt of a copy of the foregoing Answer to Amendment to Complaint on the 19th day of February, 1962.

/s/ MARVIN M. TINCHER,  
Attorney for Plaintiff.

UNITED STATES DISTRICT COURT  
For the Western District of Tennessee,  
Western Division.

ARTHUR J. GOLDBERG, Secretary of  
Labor, United States Department of  
Labor,

Plaintiff,

vs.

STEEPLETON GENERAL TIRE COM-  
PANY, INC., and A. E. STEEPLE-  
TON,

Defendants.

Civil Action.  
File No. 4344.

**REQUEST FOR ADMISSION OF FACTS.**

Plaintiff Arthur J. Goldberg requests the defendants, Steepleton General Tire Company, Inc., and A. E. Steepleton, within ten days after service of this request to admit

*Request for Admission of Facts*

for purposes of this action, subject to all pertinent objections to admissibility which may be interposed at the trial, that each of the Following statements is true:

1. The defendant, Steepleton General Tire Company, Inc.,<sup>1</sup> is the franchised dealer for General Tire and Rubber Company, in the Memphis trade area which includes parts of Arkansas and Mississippi.

2. In carrying on its business the defendant company regularly employs approximately 47 to 50 employees, including approximately 5 to 7 outside salesmen who are employed to call on various commercial and industrial business establishments and local governmental representatives for the purpose of making sales of automotive tires, tubes and tire recapping services.

3. The defendant company has one such salesman who each week calls on customers in Arkansas and another who each week calls on customers in Mississippi. Throughout the period since May 1, 1959, the said defendant repeatedly has made sales of tires, tubes and recapping service to business establishments and local governmental units located in Arkansas and Mississippi.

4. Throughout the period since May 1, 1959, the defendant company has employed several employees in its recapping shop whose duties regularly have included the recapping of automotive tires belonging to customers of the said defendant whose places of business were located in Arkansas and Mississippi. Substantial numbers of such tires, after being recapped, have been transported or delivered by the said defendant for transportation to their owners' places of business in Arkansas and Mississippi.

\* \* \* \* \*

<sup>1</sup> Hereinafter this defendant will be referred to herein simply as the defendant company.

*Request for Admission of Facts*

7. The defendant company is billed for the merchandise which it obtains from General Tire and Rubber Company, and it has not been the practice of said defendant to obtain such merchandise on consignment during the period since May 1, 1959.

8. Throughout the period since May 1, 1959, the defendant company repeatedly has obtained tires and other products which were delivered to or received at its place of business directly from points outside the State of Tennessee.

9. Throughout the period since May 1, 1959, the defendant company repeatedly has made sales of tires, tubes and other products and services for resale.

10. The defendant company has a number of employees in its recapping shop and in its service department, who regularly since September 3, 1961, have been paid at rates less than \$1.15 an hour.

11. Throughout the period since May 1, 1959, the defendant company has employed a number of employees, including but not necessarily limited to office, recapping shop and service department employees, who regularly have worked in excess of 40 hours per week and who have been compensated for such excess hours of employment at their regular rates of pay rather than at rates not less than one and one-half times the regular rates at which they are employed.

. . . . .

13. During the calendar year 1960 the defendant company derived a gross income from its sales of goods and services totalling not less than \$903,520.00.

. . . . .

*Supplemental Request for Admission*

UNITED STATES DISTRICT COURT  
For the Western District of Tennessee,  
Western Division.

ARTHUR J. GOLDBERG, Secretary of  
Labor, United States Department of  
Labor,

Plaintiff,

vs.

STEEPLETON GENERAL TIRE COM-  
PANY, INC., and A. E. STEEPLE-  
TON,

Defendants.

Civil Action.  
File No. 4344.

**SUPPLEMENTAL REQUEST FOR ADMISSION  
OF FACTS.**

Plaintiff Arthur J. Goldberg requests the defendants, Steepleton General Tire Company, Inc., and A. E. Steepleton, within 10 days after service of this request to admit for purposes of this action, subject to all pertinent objections to admissibility which may be interposed at the trial, that each of the following statements is true:

15. During the period beginning January 1, 1960, and ending December 31, 1960, the defendant, Steepleton General Tire Company, Inc.,<sup>1</sup> made one sale or more of truck tires to the customer identified in each of the following subparagraphs:

- a. Ace Freight Lines
- b. A. S. Barboro, Inc.
- c. E. L. Bruce Company

<sup>1</sup> Hereinafter this defendant will be referred to herein simply as the defendant company.

*Supplemental Request for Admission*

- d. Carters Garage Company
- e. Ray E. Carter Heavy Hauling Company
- f. Albert Cook Plumbing Company
- g. Delta Oxygen Company
- h. John A. Denies Sons Company
- i. Desoto Redi-Mix Company
- j. Engleberg Packing Company
- k. Federal Compress, Blytheville, Arkansas
- l. Federal Compress and Warehouse, Memphis, Tennessee
- m. Film Transit, Inc.
- n. General Outdoor Advertising Company
- o. Global Moving and Storage Company
- p. Gordon Foods, Inc.
- q. Gordon Transports
- r. Woody Herrin Produce Company
- s. Hoover Motor Express
- t. Klinke-Reed Dairies, Inc.
- u. Kroger Company
- v. Frank Phillips Produce
- w. Walter Pitts
- x. Robilio & Cuneo
- y. Ryder Truck Lines
- z. Southwestern Transportation Company
- na. Stewart's, Inc.

*Supplemental Request for Admission*

- bb. Transports, Inc.
- cc. Wesson Division, Hunt Foods & Ind. Mechanic Dept.
- dd. Wesson Division, Hunt Foods & Ind.
- ee. Wesson Oil and Snowdrift Sales Company
- ff. Wharton Transports
- gg. White Rose Industrial Laundry
- hh. H. R. Yost

16. During the period beginning January 1, 1960, and ending December 31, 1960, that customer of the defendant company identified in each of the following subparagraphs operated ten or more commercial vehicles:

- a. Ace Freight Lines
- b. A. S. Barboro, Inc.
- c. E. L. Bruce Company
- d. Carters Garage Company
- e. Ray E. Carter Heavy Hauling Company
- f. Albert Cook Plumbing Company
- g. Delta Oxygen Company
- h. John A. Denies Sons Company
- i. Desoto Redi-Mix Company
- j. Engleberg Packing Company
- k. Federal Compress, Blytheville, Arkansas
- l. Federal Compress and Warehouse, Memphis, Tennessee
- m. Film Transit, Inc.

*Supplemental Request for Admission*

- n. General Outdoor Advertising Company
- o. Global Moving and Storage Company
- p. Gordon Foods, Inc.
- q. Gordon Transports
- r. Woody Herrin Produce Company
- s. Hoover Motor Express
- t. Klinke-Reed Dairies, Inc.
- u. Kroger Company
- v. Frank Phillips Produce
- w. Walter Pitts
- x. Robilio & Cuneo
- y. Ryder Truck Lines
- z. Southwestern Transportation Company
- aa. Stewart's Inc.
- bb. Transports, Inc.
- cc. Wesson Division, Hunt Foods & Ind. Mechanic  
Dept.
- dd. Wesson Division, Hunt Foods & Ind.
- ee. Wesson Oil and Snowdrift Sales Company
- ff. Wharton Transports
- gg. White Rose Industrial Laundry
- hh. H. R. Yost

\* \* \* \* \*

*Replies to Request and Supplemental Request*

In the  
UNITED STATES DISTRICT COURT  
For the Western District of Tennessee,  
Western Division.

ARTHUR J. GOLDBERG, Secretary of  
Labor, United States Department of  
Labor,

Plaintiff,

vs.

STEEPLETON GENERAL TIRE COM-  
PANY, INC., and A. E. STEEPLE-  
TON,

Defendants.

Civil Action.  
File No. 4344.

**REPLIES TO REQUEST AND SUPPLEMENTAL  
REQUEST FOR ADMISSION OF FACTS.**

State of Tennessee, }  
County of Shelby. } ss.

A. E. Steepleton, one of the defendants in the above entitled action, makes the following replies to the items noted below in the request and the supplemental request for admission of facts filed herein by plaintiff as required by an order herein dated March 23, 1962, requiring answers to certain items in the said request and supplemental requests by one or the other of the two defendants herein, with leave to qualify or explain such replies as necessary in the circumstances.

1. There is no written franchise agreement and no other written agreement between General Tire & Rubber Company and Steepleton General Tire Company; Steepleton General Tire Company, hereinafter sometimes referred to as the Company, is an independent tire retailer which sells



*Replies to Request and Supplemental Request*

General Tire & Rubber Company tires, tubes and to a lesser extent, sells other products. The Company has no exclusive right as a retailer of General Tire & Rubber Company products over or in any geographic area. The Company's store is located in Memphis, Tennessee. Memphis, Tennessee lies at the extreme southwest corner of the State of Tennessee. The Company's customers principally come from the State of Tennessee, although some of the Company's customers reside or have places of business in the adjacent two states, namely, Arkansas and Mississippi.

2. During 1960 the Company regularly employed approximately forty-seven employees. Included among these employees were the corporate officers, drivers of service and delivery trucks, and approximately six salesmen who called upon and sought to make sales to people or businesses operating any type of equipment which uses pneumatic tires.

3. During 1960 nearby areas to the north, south, east and west of the Company's store was served by one or more of its salesmen. The interval between calls upon customers by a salesman at a given point varied from place to place and from time to time. Because the Company's store is located near the southwest corner of the State of Tennessee, some of the nearby areas to the south and to the west extend into the states of Mississippi and Arkansas, respectively. The volume and value of the Company's sales to customers in North Mississippi during 1960 was so small that the regular solicitation of sales from customers in that area by a Company salesman was discontinued during 1961.

4. The regular duty of employees in the Company's tire recapping department was and is to recap tires for the Company's customers. Some of these customers have places of business located in Arkansas or in Mississippi.

*Replies to Request and Supplemental Request*

The recapping done for such customers is not a "substantial" part but is, on the contrary, a small percentage of all recapping done by the Company. After tires belonging to such customers had been recapped they were either picked up by the customer, shipped back to the customer via truck line or delivered in the Company's trucks. The method of delivery of recapped tires back to the customers who owned same varied according to the customers' practices or preferences, the number and size of tires and other factors.

7. This statement is correct.

8. This statement is incorrect. During 1960 and thereafter, the Company placed almost all of its orders for tires, tubes or other products which it purchased from General Tire & Rubber Company by telephone to a warehouse of General Tire & Rubber Company located in Memphis, Tennessee. Occasionally, the Company placed such an order through a representative of General Tire & Rubber Company who called at the Company's store. The orders in either event were filled out of stock in the General Tire & Rubber Company warehouse in Memphis, Tennessee; the merchandise was delivered to the Company store or picked up by Company truck, depending upon the size of the order. Occasionally an order could not be completely filled out of stock then in the Memphis warehouse of General Tire & Rubber Company. This happened only rarely. When it did happen, the balance of such order was filled out of stock in a General Tire & Rubber Company warehouse at some other point and delivered to the Company store by whatever was the most efficient means of transportation from such other point.

9. The Company during 1960 made sales of products for resale; sales of services for resale are not considered or identified as a separate part of any transaction by the

*Replies to Request and Supplemental Request*

Company. The Company's sales for resale during 1960 and at other times were kept to a minimum by three factors:

a. The price of the Company's tires is generally higher than competitors' prices; thus fewer sales for resale can be made by the Company.

b. The profit element in a sale for resale is smaller than in sales to users of tires, thus less emphasis is placed on this type of business by the Company or by its salesmen.

c. The Company had no customers on an active sub-dealer basis during 1960 to whom the Company regularly supplied an inventory of tires or tubes for resale.

10. This statement is correct.

11. This statement is correct.

The replies to Items 12, 13, 15, 16 and 17 are made by an officer of the Company.

. . . . .

13. This statement is accurate.

15. This statement is accurate.

16. The Company does not know and cannot state how many pieces of equipment were operated by any of its customers during 1960, for many reasons, including the following:

a. It will be extremely poor customer relations for a Company representative to inquire of or seek to ascertain from any customer the total number of pieces of equipment for which such customer was purchasing or was maintaining tires at any given time.

b. During 1960 or during any year, the number of pieces of equipment for which many customers purchased tires varied from time to time.

*Replies to Request and Supplemental Request*

c. The term "vehicle" is ambiguous. By definition in accepted dictionaries a "vehicle" is said to mean a conveyance of some sort used for the purpose of carrying persons or things. Some heavy industrial or construction equipment for which the Company sells tires do not carry persons or things and are not used as conveyances in any way so that they do not constitute "vehicles" so defined. Certain equipment on which tires of the sort sold by the Company are installed may be used for carrying things but such equipment is not generally considered to be "vehicles", for example, wheelbarrows, portable conveyer belts or slides and many types of materials handling devices. Many pieces of equipment on which pneumatic tires are used consist of two or more units, each of which may be considered a "vehicle" by some persons, for example, a tractor and one or more trailer units.

d. The rapid expansion and varied practices of individuals or businesses which lease automobiles, tractors and trailers, industrial, construction or other equipment to users of such equipment complicates and makes it impossible for a tire retailer such as the Company to determine the number of pieces of equipment for which a given customer was buying or was maintaining tires during any given period. Some equipment rental arrangements obligate the lessee to furnish or replace rubber on the equipment, some equipment lease arrangements do not so obligate a lessee. The drivers of tractor-trailer units in some instances own tractors or own trailers which they operate for others. Thus the fact that certain equipment which uses pneumatic tires of the sort sold regularly by the Company may be kept at a particular place of business or that such equipment bears a business name or trademark does not necessarily mean that the business so identified purchases or maintains tires on such equipment.

• • • • •

*Findings of Fact, Conclusions of Law, etc.*

In the  
DISTRICT COURT OF THE UNITED STATES  
For the Western District of Tennessee,  
Western Division.

ARTHUR J. GOLDBERG, Secretary of  
Labor, United States Department of  
Labor,

Plaintiff,

vs.

STEEPLETON GENERAL TIRE COM-  
PANY, INC., and A. E. STEEPLE-  
TON,

Defendants.

No. 4344.  
Civil.

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER FOR JUDGMENT.**

(Filed July 27, 1962.)

This cause was heard by the court sitting without a jury upon complaint under the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 201 et seq.) hereinafter referred to as the Act. The court upon the pleadings, the proof, stipulations and briefs of counsel makes the following:

**Findings of Fact.**

1. The defendant Steepleton General Tire Company, Inc., hereinafter referred to as "the Company," is a Tennessee corporation having its office and place of business in Memphis, Tennessee, where at all times material it has been engaged in the business of selling and distributing automotive tires and tubes, and providing tire recapping and repair service.

*Findings of Fact, Conclusions of Law, etc.*

2. The defendant, A. E. Steepleton at all times since May 1, 1959 has been president of the Company and actively engaged in the management of said Company's business in relation to its work and its employees.

3. During the calendar year 1960, which was stipulated by the parties to be a representative period, the Company's gross income from sales and services to its customers was approximately \$903,520.00.

4. Employees of the defendants regularly were employed to make sales and deliveries of merchandise in interstate commerce; to recap tires for delivery to customers located outside Tennessee; to remove, repair, recap and mount tires for use on vehicles operated by customers of the defendants for transporting goods in interstate commerce; and to make and maintain sales and accounting records with reference to sales and service transactions as set out herein.

5. The Company serves customers within a radius of seventy-five (75) miles of Memphis, which is located in the southwest corner of the State of Tennessee with the State of Mississippi immediately to the south and the State of Arkansas to the west. The retail market zone or area of the City of Memphis includes counties in eastern Arkansas, northern Mississippi and West Tennessee.

6. During 1960 the gross value of goods and services sold by the Company to customers with addresses outside of the State of Tennessee was approximately \$86,000.00. This amount includes all sales and services billed to all out-of-state customers including those sales completed or services rendered in Memphis.

7. In order to meet the needs of many of its customers, the Company's servicemen do much of their work at cus-

*Findings of Fact, Conclusions of Law, etc.*

tomers' places of business. The work by such employees is done on week-ends, at night, or whenever vehicles owned by these customers are not in use so that the inspection, repair and replacement of tires interferes as little as possible with the regular business use of such vehicles. The Company's servicemen are also on call at all times including week-ends, nights and holidays to make emergency repairs to or replacement of tires on customers' vehicles so that same can be returned to regular use as promptly as possible.

8. The total receipts from sales and services of the Company was less than one million dollars (\$1,000,000.00) during 1960 and has not been as much as one million dollars (\$1,000,000.00) in any year of its operation. The value of total sales for resale during 1960 was approximately Fifty-eight Thousand Dollars (\$58,000.00) which was some six and one-half per cent ( $6\frac{1}{2}\%$ ) of the total value of sales and services performed by the Company for that year.

9. In the tire industry sales for resale are recognized to be wholesale sales. Whereas, sales of tires to consumers or users of same are recognized to be retail sales regardless of the character or identity of the purchaser, the use to which the tires may be put, the quantities purchased on the price paid for such tires.

10. Beginning early in 1950 and continuing through 1959 the National Tire Dealers and Retreaders Association, through its executive officer in Washington, D. C., presented extensive memoranda and participated in numerous conferences to develop and explain upon the request of the Wage and Hour Administration the term "retail sale" as recognized in the tire industry. This trade Association's memoranda revealed that a retail sale is recognized in the tire industry as including all sales to consumers or users.



*Findings of Fact, Conclusions of Law, etc.*

11. The definitions and classification of sales by tire dealers as published by the Wage and Hour Administrator (pages 33 and 34 of the January 1960 Interpretative Bulletin, T. 29 part 779) are contrary to those recognized in the tire industry.

12. A national account transaction in the tire industry is based upon a contract entered into between a tire manufacturer and a user of tires who operates vehicles in different places in the United States. The basic features of national account transaction include:

(a) The setting of the price and other terms of the sale by the tire manufacturer and the national account customer.

(b) The tire dealer does not know the price at which a national account customer purchases tires from the manufacturer.

(c) The expectation and insistence by the manufacturer that its retail dealers will make deliveries to manufacturer's national account customers out of inventory carried by the dealer.

(d) The adjustment of the dealer's purchases account with the manufacturer to credit the dealer for the cost of tires delivered to the manufacturer's national account customer, plus the payment of a commission of 5% to 7% of that cost by the manufacturer to the dealer to compensate him for storing and keeping the tires and for delivering them to the national account customers.

(e) The billing of and collection from the national account customers by the tire manufacturer, not by the tire dealer.

(f) The disallowance of the value of tires delivered by the dealer to national account customers when the



*Findings of Fact, Conclusions of Law, etc.*

dealer's volume bonus is computed and allowed by the manufacturer.

13. The Company herein is an independent tire dealer which handles products of the General Tire and Rubber Company. In accordance with national account contracts entered into by the General Tire and Rubber Company tires are delivered by its retail outlets but no participation by the dealer, other than the delivery to the customer, is permitted. The deliveries by the Company to General Tire Company's national account customers are not recognized in the tire industry as being sales by the local dealer. Sales taxes are neither collected nor paid by the local dealer on such transactions.

14. For purposes of more complete accounting records and more effective managerial control some tire retailers subdivide their retail sales into separate categories. One covers the sale of tires under deferred payment plans, known among tire retailers as "budget sales", which are sales on installment contracts. Another category of retail sales is known as commercial account sales covering truck tire sales to business firms. The competition among tire dealers for this class of business requires them to make such sales for only a small margin over their cost. Particular salesmen may be assigned by a dealer to specialize in sales of this nature. The dealer segregates commercial accounts in his accounting records so that he can more readily determine the profit or loss realized thereon. Although commercial accounts are sometimes segregated for control purposes, they are recognized in the tire industry as being retail sales since they are made to consumers rather than for resale.

15. (a) The Company is an establishment which serves customers in the retail market area of Memphis, Tennessee, where its only place of business is located.

*Findings of Fact, Conclusions of Law, etc.*

(b) More than fifty per cent (50%) of the defendant's annual dollar volume of sales of goods and services is made within the State of Tennessee.

(c) More than seventy-five per cent (75%) of the Company's annual dollar volume of sales of goods and services is not for resale and is recognized as retail sales and services in the tire retailing industry.

(d) It is recognized in the retail tire industry that all sales of goods or services to consumers are retail sales. Sales of goods and services which the Company makes for resale constitute approximately six per cent (6%) of the total dollar volume of such sales of goods and services.

(e) The only goods which this defendant makes or processes are the tires which it retreads for its customers, all of which is done at the Company's place of business in Memphis, Tennessee.

(f) More than eighty-five per cent (85%) of this defendant's sales of tires which it retreads for sale are sold within the State of Tennessee.

**Conclusions of Law.**

I.

The Court has jurisdiction of the parties and the subject matter of this litigation.

II.

The defendant herein and its employees are engaged in commerce and in the production of goods for commerce within the meaning of the Act. Its employees are entitled to the benefits of the Act unless the Company herein is found to be exempt therefrom. Title 29, U. S. C., Sec. 201, et seq., *Mitchell v. Kentucky Finance Co.*, 359 U. S. 290.

*Findings of Fact, Conclusions of Law, etc.*

III.

Defendant, being in commerce, must carry the burden of proving its entitlement to the exempting provisions of the Act. Title 29, U. S. C., Sec. 213 (a) 2, 4; *Arnold v. Ben Kanowsky, Inc.*, 361 U. S. 388.

IV.

Under the facts herein as found by the court more than fifty per cent (50%) of the defendant's annual dollar volume of sales of goods and services is produced within the State of Tennessee. More than eighty-five per cent (85%) of defendant's annual dollar volume of sales of goods and services relative to the tire recapping portion of its business is produced in Tennessee, and more than seventy-five per cent (75%) of its annual dollar volume of sales of goods and services is not for resale. We, therefore, find the defendant herein is a retail and service establishment. Title 29, U. S. C., Sec. 213 (a) 2, 4.

V.

While the exemptions under the Fair Labor Standards Act are to be strictly construed, *Arnold v. Ben Kanowsky*, supra, the legislative history of the applicable 1949 Amendment to the Act clearly indicates that the "business use test" theretofore adhered to is discarded by the Congress to give recognition to the particular industry's own classification of those sales which are by it considered to be retail sales under the Act. No expansion beyond the letter and plain intent of the Act is necessary in this case to place the defendant under exemption in view of the proof herein including the testimony of knowledgeable persons in the industry. *Mitchell v. Kentucky Finance Co.*, supra, *Mitchell v. T. F. Fertilizer Works*, 233 F. 2d 284 (C. A. 5th, 1956); *Boisseau v. Mitchell*, 218 F. 2d 734 (C. A. 5th, 1955).

*Findings of Fact, Conclusions of Law, etc.*

VI.

The court concludes under the facts and circumstances of this case the defendant Company is not subject to the Fair Labor Standards Act, as amended, Title 29, U. S. C., Sec. 201 et seq., since it is a retail and service establishment and exempt from its provisions by reason of sections 13 (a) 2 and 4.

VII.

The complaint herein will be dismissed at the plaintiff's cost.

**Order for Judgment.**

Judgment in accordance with the foregoing Findings of Fact and Conclusions of Law will be entered within five (5) days.

MARION S. BOYD,  
United States District Judge.

A True Copy.

Attest:

W. LLOYD JOHNSON,  
Clerk,

By J. W. ISELE,

D. C.

7-27-62

(Seal)

*Final Decree*

In the  
DISTRICT COURT OF THE UNITED STATES  
For the Western District of Tennessee,  
Western Division.

ARTHUR J. GOLDBERG, Secretary of  
Labor, United States Department of  
Labor,

Plaintiff,

vs.

STEEPLETON GENERAL TIRE COM-  
PANY, INC., and A. E. STEEPLE-  
TON,

Defendants.

No. 4344.  
Civil.

**FINAL DECREE.**

(Filed Jul. 31, 1962.)

This cause came on to be heard by the Court sitting without a jury on May 21, 1962, upon complaint under the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 201, et seq.), the amended complaint, the answer to the complaint and answer to the amended complaint, all pleadings in this cause, the testimony of witnesses, exhibits, stipulations, arguments and briefs of counsel; at the conclusion of which the Court took this cause under advisement;

Thereafter on July 27, 1962, the Court filed in this cause its written findings of fact and conclusions of law which are determinative of the issues presented by the pleadings and by the proof and by which the Court directed the entry of a judgment dismissing the complaint herein at the plaintiff's cost.

*Final Decree*

It is, therefore, Ordered, Adjudged and Decreed by the Court that the complaint of plaintiff, Arthur J. Goldberg, Secretary of Labor, United States Department of Labor, as amended, be and the same is hereby dismissed.

It is further Ordered, Adjudged and Decreed that the written findings of fact and conclusions of law filed herein on July 27, 1962 be and the same are hereby made a part of the record in this cause.

All of which is ordered, adjudged and decreed this 31st day of July, 1962. The matter of costs is reserved pending disposition of plaintiff's motion to amend the findings of fact, conclusions of law and order for judgment filed herein.

MARION S. BOYD,  
Judge.

Approved as to Form:

s/d JETER S. RAY,  
JETER S. RAY, Regional Attorney,  
s/d MARVIN M. TINCHER,  
MARVIN M. TINCHER, Attorney,  
Attorneys for Plaintiff,

LUCIUS BURCH, JR.,  
LUCIUS E. BURCH, JR., by TM II,  
TOM MITCHELL, JR.,  
TOM MITCHELL, JR.,  
Attorneys for Defendant.

A True Copy.

Attest:

W. LLOYD JOHNSON,

Clerk,

By V. LaFON,

D. C.

(Seal)

*Order Amending Order for Judgment*

In the  
UNITED STATES DISTRICT COURT  
For the Western District of Tennessee,  
Western Division.

ARTHUR J. GOLDBERG, Secretary of  
Labor, United States Department of  
Labor, Plaintiff,

vs.

STEEPLETON GENERAL TIRE COM-  
PANY, INC., AND A. E. STEEPLE-  
TON, Defendants.

Civil Action.  
No. 4344.

**ORDER AMENDING ORDER FOR JUDGMENT.**

This cause came on to be heard on plaintiff's motion that the order for judgment herein be amended by striking from Paragraph VII on page 8 thereof the words "at the plaintiff's cost" and on written memorandum by attorneys for both parties, from all of which it appears to the Court that plaintiff's motion should be granted.

It is, therefore, Ordered, Adjudged and Decreed, that the order for judgment entered herein July 27, 1962, be and the same is hereby amended by striking the words "at the plaintiff's cost" from Paragraph VII on page 8 thereof.

This 2 day of August, 1962.

MARION S. BOYD,

Approved as to Form:

Judge.

TOM MITCHELL, JR.,

TOM MITCHELL, JR.,

A True Copy.

Attorney for Defendants.

Attest:

W. LLOYD JOHNSON,

By J. W. ISELE,

Clerk,

(Seal)

D. C.

*Notice of Appeal*

UNITED STATES DISTRICT COURT  
For the Western District of Tennessee,  
Western Division.

W. WILLARD WIRTZ, Secretary of  
Labor, United States Department of  
Labor,

Plaintiff,

vs.

STEEPLETON GENERAL TIRE COM-  
PANY, INC., AND A. E. STEEPLE-  
TON,

Defendants.

Civil Action.  
File No. 4344.

**NOTICE OF APPEAL.**

(Filed Sep. 27, 1962.)

Notice is hereby given that W. Willard Wirtz, Secretary of Labor, United States Department of Labor, Plaintiff, successor to Arthur J. Goldberg, original plaintiff herein, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the final decree entered in this action on July 31, 1962.

/s/ JETER S. RAY,

JETER S. RAY,

/s/ MARVIN M. TINCHER,

MARVIN M. TINCHER,

United States Department of Labor,  
Attorneys for Appellant.

A True Copy.

Attest:

W. LLOYD JOHNSON,

Clerk,

By J. W. ISELE,

D. C.

(Seal)



*Notice of Cross-Appeal as to Part of Judgment*

UNITED STATES DISTRICT COURT  
For the Western District of Tennessee,  
Western Division.

W. WILLARD WIRTZ, Secretary of  
Labor, United States Department of  
Labor,

Plaintiff,

vs.

STEEPLETON GENERAL TIRE COM-  
PANY, INC., AND A. E. STEEPLE-  
TON,

Defendants.

Civil Action.  
No. 4344.

**NOTICE OF CROSS-APPEAL AS TO PART  
OF THE JUDGMENT.**

Notice is hereby given that Steepleton General Tire Company, Inc., and A. E. Steepleton, defendants herein, hereby appeal to the United States Court of Appeals for the Sixth Circuit from so much of the final decree entered in this action on July 31, 1962 as effectively adjudicates, or makes a part of the record herein any finding, conclusion or adjudication, that the defendant, Steepleton General Tire Company, Inc., is engaged in commerce and in the production of goods for commerce within the meaning of the Fair Labor Standards Act, all as amended by the order entered herein on August 2, 1962, granting the original plaintiff's motion pursuant in part to Rule 52 (b), Federal Rules of Civil Procedure, for such amendment.

LUCIUS E. BURCH, JR.,  
LUCIUS E. BURCH, JR.,

By TM II

TOM MITCHELL, JR.,  
TOM MITCHELL, JR.,

Attorneys for Cross-Appellants.

• • • • •

*Deposition of Mr. A. E. Steepleton*

2\* **DEPOSITION OF MR. A. E. STEEPLETON,**

being of lawful age, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, as hereinafter certified, deposed as follows:

**Direct Examination,**

By Mr. Tencher:

Q. Will you please state your name and address?

A. A. E. Steepleton, S-t-e-e-p-l-e-t-o-n, 255 Ben Avon Way, Memphis, Tennessee.

3 Q. Mr. Steepleton, you are the defendant in this case of Goldberg versus Steepleton General Tire Company and A. E. Steepleton?

A. I am an employee of the company, yes. Just the company is the defendant, is that correct?

Q. No, you are named as a defendant, too, and my question simply is, are you the A. E. Steepleton who is named as a defendant in the case?

A. If I am named in it, I am; yes, I am president of the corporation.

Mr. Mitchell: The record reflects that he is president of the corporation.

Q. In addition to being president of the company, I take it, you are the active manager in directing affairs of the company?

A. Yes, sir.

Q. Are you also the principal owner of the company?

A. Yes.

Q. Is the Steepleton General Tire Company a franchised dealer in the Memphis area for General Tire & Rubber Company?

A. Yes.

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\* Numbers appearing in outer edge of text indicate page numbers of original stenographic transcript of testimony.

*Deposition of Mr. A. E. Steepleton*

Q. For how long have you been the franchised dealer of General Tire & Rubber Company?

4 A. When I came here, I came here in 1944, and at that time it was a company-owned operation and subsequently I bought the stock of the company and became owner of all the stock.

Q. Yes, sir.

A. It was some two years later, I think 1946 or '47. I have forgotten the date.

Q. Mr. Steepleton, is there a written contract or dealer agreement between you and General Tire & Rubber Company?

A. No.

Q. What territorial limits does your company have to operate in as a dealer for General?

A. Well, generally we operate, oh, within a radius of about 50 or 75 miles. We have no closely defined territory as such. In a case where there is another substantial General dealer within that particular radius, then we refrain from stepping on his toes.

Q. Yes, sir. Are parts of Arkansas and Mississippi included in the territory that you serve?

A. Yes.

Q. Now, as the franchised dealer for the company, I assume that you sell and distribute various products that are manufactured by General Tire & Rubber Company?

A. That's right. They manufacture many products, but ours is confined to tires and tubes.

Q. All right. Are any batteries included?

5 A. Some few batteries, yes; however, they don't manufacture batteries.

Q. And primarily the products that you deal in are the tires and tubes, is that right?

A. Yes.

Q. And does that include, I assume that in addition to

*Deposition of Mr. A. E. Steepleton*

passenger tires and tubes and ordinary over-the-road truck tires and tubes, that you also from time to time deal in industrial type tires and tubes, earth moving equipment tires and tubes, and various products of that nature, too?

A. Well, we will sell anything that the company makes that somebody will buy.

Q. Yes, sir. Do you also sell recapped tires as well as new tires?

A. We do lots of recapping, and it is confined 99 percent to—at least 99 percent to the service of recapping other people's tires.

Q. I assume from that you mean on more or less a custom basis?

A. Custom basis, yes.

Q. And where is that recapping done?

A. At our place of business at 246 Monroe.

Q. Do you have a definite department of your business which you term the recapping department, or which would probably be termed a recapping department?

6 A. We call it a shop; it is a recapping shop.

\* \* \* \* \*

7 Q. Now, with reference to truck tires, do your employees remove the old tires from the customer's vehicle, and after they have been recapped then put them back on the vehicle?

A. In most cases they do.

Q. And in so doing, are you able to maintain the identity of the customer's tires so that he will get the same tire back after it has been recapped?

8 A. Yes, we have a continuous record of the serial number of every tire that comes into our shop, and it is tagged in his name, and the same tire is  
r d.

Q. Yes. Could you give us an approximation of the

*Deposition of Mr. A. E. Steepleton*

relative proportion between truck tires and passenger tires that you perform recapping on?

A. I don't keep any such record, but it is about 25 per cent. Are you speaking of units or dollar volume?

Q. I believe dollar volume would be preferable. Now, either way that you can approximate it will be satisfactory to me.

A. I can approximate it in dollar volume, that the passenger tire recapping is approximately 25 per cent of the total.

Q. And the other 75 per cent would be trucks or heavy equipment?

A. Right.

Q. Do you from time to time recap any passenger tires and put them in stock for sale?

A. We do a few, but there again dollar-wise it is infinitesimal, the amount of the total.

. . . . .

12 Q. From what sources do you obtain your retread rubber that is used in recapping?

A. We buy most of our rubber from General.

Q. Now, in addition to their retread rubber—is that called camel-back?

A. That is a term that is quite often referred to, yes.

Q. In addition to the retread rubber, I assume you get your tires and your tubes and other products you sell from General Tire & Rubber Company?

A. Most of them.

Q. What places do you obtain those products from, Mr. Steepleton?

A. Well, General has a division warehouse here in Memphis, and all of our orders are placed at that source.

Q. Yes, sir.

A. And most of the tires and other commodities that we buy from General come out of their warehouse.

*Deposition of Mr. A. E. Steepleton*

Q. But do you find that from time to time that when you place an order for something, you place the order with the district office here of General Tire Company. Do you find that the products you need are not in stock and they will be shipped to you from some other point?

A. Very seldom. Occasionally some item, we may order ten of an item and they have got nine; we get the  
13 nine and they will back order the other one, and it will come in from some source, wherever the nearest warehouse might be.

Q. And sometimes that will be from their factory at Mayfield, Kentucky?

A. It could be from there. It could be from Waco, Texas, Kansas City, Atlanta, any warehouse point, but that is very rare that we have to get anything from out of town.

. . . . .

15 Q. Do you sell to any fleet accounts in Arkansas and Mississippi?

A. Well, what is a fleet account?

Q. Well, I am going to ask you that in a few minutes, and this might be a good place to do it. Is the term "fleet account" one that is used in the tire business to such an extent that there is a recognized meaning for the term?

A. Well, I am sure the term is used. I still don't know the meaning of it.

Q. Do you use it in your business, the term "fleet account"?

A. Not particularly with any particular distinction, no.

Q. You do have a number of regular customers who operate fleets of motor vehicles, either trucks or cars or both, do you not?

A. Yes, we have customers that have all types of equipment.

*Deposition of Mr. A. E. Steepleton*

Q. Would you say that the biggest portion of your business is done with customers who have five or more units of motor vehicles in operation?

A. Are you referring to our total business or to  
16 our new merchandise business?

Q. Well, both is what I had in mind. Now, if there is a distinction or if you think to make the picture clear we should break it down, then I will be glad to do that.

A. Well, of course, we have no record of how many vehicles any customer has, but I would say, by and large, that since almost every family has at least two automobiles, maybe everybody, every customer we have could be considered operating a fleet.

Q. Well, now, Mr. Steepleton, I don't intend to make a distinction with reference to your customers who have one or more than one family car, but I would like to determine from your knowledge of your business whether or not the principal volume, dollar volume of your business, is from customers who operate fleets of commercial vehicles?

Mr. Mitchell: Well, I think the witness has indicated, Mr. Tencher, that he doesn't know the particular category or definition for the word "fleet" or "fleet account" which you previously used, and that he does not know how many vehicles are operated by particular customers at a particular time. Now, within the framework of that explanation and qualification, and if he can, I believe  
you are entitled to an answer to your last question.

17 Q. Would you go ahead now, Mr. Steepleton, and see if you can answer it?

A. Well, I would imagine that in dollar volume basis, including service, recapping, and all of our business, that our customers have several vehicles. I can't say how many.

Q. But, now, if I understand you correctly, you are saying that the biggest portion of these, more than 50

*Deposition of Mr. A. E. Steepleton*

percent of your business dollar-wise, is obtained from customers who have multiple units of commercial vehicles, would that be correct?

A. I think that is substantially correct.

Q. Now, I will get back to my other question. Do you have any such customers in Arkansas and Mississippi that you regularly sell to?

A. We have a few customers in Arkansas and Mississippi, and I imagine that, by and large, they would fall into that category.

Q. You have salesmen who regularly travel in those two states as well as in Tennessee to solicit such business, do you not?

A. Well, not regularly. We do regularly but not on a daily basis. We have one man who makes one trip a week into Arkansas, and we have one that goes one day a week into Mississippi.

18 Q. Yes, sir. Are those your commercial salesmen?

A. Yes, sir, we generally term them commercial salesmen because they are by and large soliciting recapping business, and in our method of approach to this business, we find that the new tire business comes as a natural result of soliciting recapping business.

Q. Well, now, you call them commercial salesmen because they are soliciting recapping business. Is it correct that they are soliciting that business by and large from the operators of multiple units?

A. They are soliciting from anybody that needs tires or needs recapping.

Q. But your commercial salesmen, I take it, do not call from house to house as a general proposition to call on the individuals to solicit recapping business?

A. No.

Q. They are calling on business establishments?

A. Business establishments, yes.

. . . . .



*Deposition of Mr. A. E. Steepleton*

21 Q. With whom in the General Tire Company organization do you transact business in day to day activities, Mr. Steepleton?

22 A. More directly with our local division manager, Mr. Brunskill.

Q. Now, to what extent do you deal directly with Mr. Brunskill in your business?

A. Well, merely on the basis of placing orders through his salesmen, sometimes through his salesmen, and most often by direct telephone call to his office, but so far as our business dealings with Brunskill direct, he is a source of counsel and business management and advisory capacity so far as the company's policies are concerned.

Q. Is there someone else in the district office here that you deal with directly, such as the territory manager?

A. He has a territory manager who is assigned to our account.

Q. All right, who is that man?

A. His name is Meeks.

Q. Does Mr. Meeks call at your establishment from time to time in the capacity of salesman or adviser or any other capacity?

A. Yes.

Q. And what would be his function in such contacts?

A. Well, his function is to carry out his soliciting business, I suppose, number one, to encourage us to help carry out all the company policies such as advertising and merchandising methods and so forth.

23 Q. Does he from time to time work with your salesmen in calling on some of your customers or your potential customers?

A. Yes.

Q. Now, would you explain the procedure by which your company obtains merchandise from General Tire & Rubber Company, whether by written order, telephone order, or how?

*Deposition of Mr. A. E. Steepleton*

A. Well, it is 99 percent by telephone, I would say, or it must be 100 percent by telephone. I don't remember of ever—no, let me change that a little bit. When this man calls on us, if at the particular time he happens to be in there and we want to make him feel good by giving him an order, we give him an order verbally, and he carries out the function of getting it placed and delivered, but in most instances we order by telephone.

Q. Who are the persons in your organization who are authorized to place those orders by telephone?

A. Well, myself, my son, Mrs. Lauderdale, and if none of us are available and some emergency item was needed, I suppose anybody concerned has the authority to go ahead and perform that function.

Q. And do those orders have to be telephoned to anyone in particular at the district office?

A. No.

Q. When an order for merchandise is placed with the General Tire Company, Mr. Steepleton, would you  
24 explain the terms by which the order is transmitted to you, the merchandise transmitted to you, whether it be on consignment or whether you are billed, and if so, the terms?

A. We are billed immediately or as soon as the billing process can be completed, and the terms are 2 percent cash discount and 10th prox. on everything except truck tires, and I believe that is 60 days.

Q. Sixty days net?

A. No. I think we still get a cash discount.

Q. Is any substantial amount of your merchandise delivered to you by General Tire Company on consignment?

A. None of it.

Q. None. Does your company submit any regular profit and loss statement or balance sheet to General Tire Company?

*Deposition of Mr. A. E. Steepleton*

A. We are required to periodically send in a statement to the Credit Department.

Q. Does that go to the district office here?

A. I am not sure.

Q. As I understand it, the Credit Department of General Tire Company which handles your account and bills you is at Dallas, Texas, is that correct?

A. The Credit Department is at Dallas. The billing, I think, is all essentially done on IBM machines in Akron.

Q. And when you say periodically, you submit a  
25 report of some kind, what is the report? Do you have a name for it?

A. We get out a monthly operating statement.

Q. Mr. Zaveson assigned as an exhibit to his deposition some sheets which were marked 5-A, 5-B, and 5-C. Do you know whether your monthly operating statement is on any such form as that, Mr. Steepleton?

A. Yes, we use the same form. This is a form that is used by General Tire & Rubber Company stores, divisions and stores that they have financial interest in, and we have adopted the same accounting procedure and the same form mainly for comparison reasons, because we arrive at these comparative percentages of all operating phases of the business by conforming to their same accounting procedure.

Q. I see. Now, I assume that your company keeps a copy of these operating statements that you submit to General Tire Company?

A. Yes.

. . . . .

26 Q. How many employees does your company have at present?

A. I am not sure just right to the exact amount, but on the last day of December it was an even 50. No, the last day of November—excuse me—at the end of our fiscal year.

*Deposition of Mr. A. E. Steepleton*

Q. Is that generally about the number that you operate with?

A. That is about it.

Q. And as I understand it, you have two buildings there at your location on Monroe Street?

A. Right.

Q. But you operate as just a single establishment, is that correct?

A. Yes.

\* \* \* \* \*

28 Q. (By Mr. Tencher) Mr. Steepleton, if I understand you correctly, you testified a few minutes ago that you do not supply new merchandise to any registered sub-dealers of General Tire Company, is that correct?

A. That is correct.

Q. Do you have any General Tire Company dealers or people who regularly sell General Tire Company products that you do supply?

A. No. Are you speaking of right at this particular moment or at some time in the past?

Q. Well, I had in mind at the present time, but if you do not have any now and have had in the recent past, I would like to get that information.

A. We have had from time to time some marketing agreements with some of the car dealers, but we have at the present time no sub-dealers or anyone operating as such on any permanent arrangement. We occasionally —some dealer will want to buy a General tire or a set of particular tires because he has a customer that has requested them.

29 Q. I notice among the customers that you had in 1960 one Austin-Bliss General Tire Company. Do you know who that is or the nature of his business?

A. Austin-Bliss? Where?

*Deposition of Mr. A. E. Steepleton*

Q. I don't have the address.

A. There is some—I have a recollection of it as a General Tire distributor somewhere in the United States, but I can't recall the name of the town, but do you have the amount of the sale there?

Q. No, I don't. These are simply names taken from your records.

A. Just at this minute in trying to recollect who that particular person is, I believe it is a General Tire dealer that we sold a piece of equipment to somewhere and shipped it, disposal of fixed assets or something of that nature.

Q. Do you have any recollection with reference to business that you did with Fagor General Tire Service Company?

A. Fagor is a General Tire dealer in Monroe, Louisiana, and it is possible that we probably recapped some tires for him.

Q. Do you have any recollection concerning a Wilson General Tire Service?

A. There is a Wilson that is a General Tire dealer in Milwaukee. I don't recall any business dealings with him unless we might have sold him some used equipment.

Q. Do you still from time to time sell tires, either  
30 new tires or recapped tires, to used car dealers?

A. Occasionally, very little.

Q. And to garages in your territory?

A. Very little.

Q. But some?

A. Some.

Q. Yes, sir.

A. Our price is generally higher than our competitors, so we are unable to secure that type of business.

Q. When you do make sales of tires to garages and used car dealers, you are aware, are you not, that those are sales for resale purposes?

*Deposition of Mr. A. E. Steepleton*

A. In most cases, yes, where they supply exemption numbers, certificates, and our records I think will indicate those instances.

Q. Do you prepare a daily recap sheet in connection with your sales in the operation of your business?

A. We do by product.

Q. Does that sheet in any way reflect the type of sale, whether it is one for resale purposes or sale for use of customers on vehicles?

A. No.

\* \* \* \* \*

32 Q. In connection with the new products that you sell, does General Tire & Rubber Company provide you with a price list to use in making those sales?

A. Yes, they provide us a suggested list price.

Q. Is that termed in the business a code price list?

33 A. No. In recent years, I think in the last two years there has been a code put on the price list which is a key to arrive at cost.

Q. What is the designation of price lists that you use in making sales?

A. Well, actually in the tire business, a price list doesn't mean anything because nobody knows the price of a tire from day to day, and it is just a figure that is used as the starting point trying to arrive at some kind of a selling point.

Q. But it is used, I take it, as a starting point or in some other way; basically the price list is a part of your pricing system, is it not?

A. Yes.

Q. And is there any particular designation for this price list as a resale list, price list or some other designation? I just wonder what you call it.

A. A price list.

Q. Now, you say that in recent years a code was put

*Deposition of Mr. A. E. Steepleton*

on it to determine cost. Would you explain what the code is and how it is used?

A. Well, the code is an astronomical figure that is put on there that is higher than the list price, and by deducting certain discounts from that code figure, we arrive at our cost, merely because the list prices do not have the same relationship to cost all the way through, but  
34 the code price does.

Q. Now, does the code price which you have, I suppose in the form of a number of sheets of paper, show you what prices you are paying for any particular merchandise that you might want to order from General Tire Company?

A. State that again.

Mr. Tencher: Let's have the reporter read it back.

(The reporter read the last question aloud.)

A. Well, in code prices, they are printed not on a number of sheets of paper, but it is printed on the suggested list price and opposite that list price number.

Q. And is this the document, printed price list, that you and your salesmen use in making sales to your customers?

A. Which?

Q. The one you have described.

A. The price list?

Q. Yes, sir.

A. Yes.

Q. And you use that same price then, that same price list, to determine a beginning for bargaining with your customer over the price you will charge him and also as a basis of determining what your cost is, is that correct?

A. That is correct.

Q. Does that same price list give you a guide for  
35 pricing the recapping you do for customers?

A. No.

*Deposition of Mr. A. E. Steepleton*

Q. Do you have a separate printed price list for that purpose?

A. Yes, we make up our own price list.

\* \* \* \* \*

36 Q. From such a price list as you stated that you could let us have, could you explain how the wholesale price is determined from the code price expressed there or the code symbol?

A. Well, we have no definite prices at any given time for any particular class of people or buyer.

37 Q. When you make a sale to a dealer, for example, is there a percentage of discount that you allow the dealer from the retail price that is listed there in the price list?

A. Yes.

Q. What would be the percentage of discount that you would allow a dealer?

A. Well, that depends on the commodity. As I stated before, there is a very inconsistent relationship to list and cost at variance with the different sizes and types of tires, and that discount by no means can be consistent.

Q. Well, does it follow any sort of pattern? For example, on passenger tires which you would sell to a dealer, would you normally allow him, say, 40 percent discount?

A. Well, that would be a fair figure to shoot at.

Q. Would that be a typical discount to a dealer of passenger tires?

A. Well, it would be from our list price. In some instances we make up our own list price and don't follow the list that is prepared by General Tire.

Q. Yes, sir. Have you made up— (interrupted)

A. —because of these inconsistencies.

Q. Have you made up a list price for both truck tires and passenger tires to be used in your business?



*Deposition of Mr. A. E. Steepleton*

A. We have on the passenger tires.

Q. On the passenger tires only?

38 A. We have made some changes in the code price on the truck tires.

Q. And in making those changes, have you simply penciled them in on the price list furnished you by General, or have you made up any?

A. We have had them printed.

Q. You have had them printed? Did you have copies of those that were in use in 1960?

A. I am not sure.

Q. Now, during the time that you would have had this price list that you made up for use in your business with reference to passenger tires, when you put a list price there, would that be the price at which you would sell passenger tires to a general member of the public who would come in and want to buy a set of tires for his car?

A. Well, that is the price we would like to get, but it has never happened.

Q. Even the prices that you made up have not been used in making sales?

A. No, the price lists are made up for the purpose of having plenty of leeway in the trading.

Q. As a part of promotion, I suppose, or bargaining on an individual basis?

A. Correct.

39 Q. Now, what would be the normal or typical deviation from the list price that you would make to a person who simply wanted one tire or four tires for his automobile?

A. Well, usually in most cases there is some salvageable used merchandise involved in the deal, and we try to trade on what its resale value is.

Q. Aside from taking in used tires in trade, and I take it that your salesmen would have an idea how much

*Deposition of Mr. A. E. Steepleton*

actual value that tire would have, aside from giving the customer either the actual value to you of his used merchandise, how much more adjustment or reduction from that list price would you normally make in this sale?

A. There again that would be determined by the product, because in some of these the mark-up is very inconsistent. Some cases the mark-up is probably 100 percent, and on the same price list and on a different kind of a tire and different size and a different type, it may only be 25 or 30 percent, so there again trying to establish discount percentages is not feasible because it just is not practical to do so.

Q. Yes, sir. Well, take one of your standard products. I have seen them advertised, but I don't recall offhand the tradename, but it is the dual or the twin tread.

A. Dual 90.

Q. Or your premium tire—what was the term?

40 A. Dual 90.

Q. Dual 90. Now, how much reduction from your list price on the dual 90 would you be willing to make to the ordinary individual purchaser?

A. Well, there are circumstances which alter it, and sometimes you have got an adjustment situation involved, but we try to sell the tire at two 10's off. We sometimes go three 10's off, and we sometimes go 40 percent off.

Q. To an individual, even though he is not a fleet owner or anyone that you would expect to help you get business from a fleet owner?

A. That's right.

Q. Now, how much reduction—perhaps before we go into that, we better come down to one of your utility type tires that would be used, for example, by a taxicab company or some company that has a number of ten or twenty automobiles used by its salesmen in the business, the type of tire they might use. Do they normally buy the dual 90 or one that is not a premium tire?

*Deposition of Mr. A. E. Steepleton*

A. Normally they would not buy a premium tire.

Q. Take the type frequently referred to as first line tires. Would that be the type of tire that General Foods Company, for example, would use on its fleet of salesmen's automobiles?

A. It probably would be, yes, sir.

41 Q. All right, now, how much reduction from your list price would you be willing to make to the average individual customer for one or a set of four of the first line tires?

A. Do you mean based on our current list price or something that was in existence two years ago?

Q. Well, I prefer to make it for 1960. What was then your current selling price on that particular tire if you can recall it?

Mr. Mitchell: For the record you are talking about—I did not follow the question perhaps. You are talking about a sale to an individual automobile owner?

Mr. Tencher: Yes.

Mr. Mitchell: Of a product you have classified as a first line tire?

Mr. Tencher: Yes.

Mr. Mitchell: The question then is what reduction or what discount would be allowed on that kind of transaction in 1960?

Mr. Tencher: Yes.

A. Well, I don't recall right offhand what our percentage of mark-up was at that time, but we would attempt to sell the tire on the basis of trying to gross somewhere in the neighborhood of 25 to 35 percent gross profit.

42 Q. All right, now, if you were making a sale of a number of tires of that first line tire in the same period of time to a company that has a fleet of automobiles used in its business, what would be the reduction that you would make?

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A. We would still try to maintain the same gross profit, maybe the minimum of it, because in all cases tires are a commodity that we have to service and live with from the time we put them on a man's wheels until they are worn out, and, therefore, it isn't the type of merchandise that you can expect to dump over here and forget it. Being a retail service establishment, that is our obligation to follow the life of that commodity.

Q. Now, you have used the term "retail service establishment" in your answer, and I assume from that that you are simply characterizing your own appraisal of the type of business that you are carrying on, is that right?

A. That is correct.

Q. Could you name for us one of your customers that you had in 1960 that you sold passenger tires to on a fleet account basis? I mean by that either he had ten or more passenger cars used in the business?

A. Well, most of our commercial type of accounts, of course, are truck operators and insofar as passenger car tires go or are involved, I can't name one that we sold any particular quantity of tires to. Usually the  
43 passenger tires that are bought by a commercial type of account are more or less on the individual, personal type of basis. A certain individual owns or drives a company car, and he puts a set of tires on his car and bills it to the company.

Q. For example, United Taxi Company is one of your customers?

A. United Taxi would be the only one, I guess, that we have sold any quantity of passenger tires to.

Q. What would be the typical discount that you would give or did give to United Taxi Company?

A. I am not sure. That is handled by our retail tire department, but I think about 30 percent, perhaps 33⅓. I am not sure.

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Q. Would that be reflected in your sales records or invoices or any sort of record?

A. Not as such. It would reflect a net price, but we don't show discounts. I don't believe they do. One salesman may write a ticket up occasionally showing a discount, but for the most part, only a net price is shown.

Q. I take it from that it would be necessary then to check the individual sales tickets and from them determine the product that was sold and the price at which it was sold, and compare that price with the list price in order to determine how much discount was allowed?

A. That is substantially true, yes.

44 Q. Now, in the tire trade and in your business, is the term "national accounts" in general use, Mr. Steepleton?

A. Yes, it is used by the factory.

Q. And do you in your business supply products to some of these national accounts of General Tire Company?

A. We make deliveries for General. Our national account arrangements are made between the two companies, and we act as the delivering agent.

Q. I suppose General supplies you with a list of the people in this particular area that have such a national account arrangement with them?

A. Yes. When they make a national account arrangement with a company, why, we are advised and asked to cooperate in servicing them.

Q. And as I understand it, the billing for whatever products you supply to the particular account is done directly by the General Tire Company, the home office?

A. Yes.

Q. Could you name the national accounts that you have been supplying products to in 1960 here in the Memphis area?

A. I can name a few. I couldn't begin to recall all of

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them. There are some we might have been doing business with in 1959 or took care of in 1959 that we didn't in 1960, and vice versa, but I think that Wilson Packing Company would be one of the accounts that we serviced, probably Kroger during that year——

Q. Would General Foods be one?

A. And General Foods. Have you got some more on the list there?

Q. Yes. International Harvester?

A. International Harvester, correct, the Federal Government.

Q. Colonial Baking Company?

A. I don't believe we were doing business with Colonial Baking Company during that period.

Q. Are you at present?

A. We did some in 1961.

Q. How about Continental Baking Company?

A. But it was all recapping, all the business we did for them. Probably Continental, yes, during 1960. Stewart's, a subsidiary of Continental.

Q. Texas Gas Transmission Company?

A. I don't believe we—I am not sure about them.

Q. How about Arrow Equipment Company?

A. Arrow Equipment Company, manufacturing.

Q. The products you supplied to that company would be for use on new equipment such as boat trailers?

A. They manufacture trailers, and that is original equipment business, yes.

46 Q. How about International Harvester, were they getting General Tire products for use on original equipment here?

A. Yes.

Q. And how about Tri-State Mack?

A. Tri-State Mack.

Q. That would be for use on original equipment?

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A. That would be actually—anything that went to Tri-State Mack would be only a delivery to them and eventually covered by a Mack Truck Company purchase order.

Q. For use on original equipment?

A. To General Tire for original equipment.

Q. Yes, sir. Now, let's take Wilson Packing Company as an example for one of your national accounts. Would you just explain the procedure whereby you receive an order from Wilson and how it is billed and so forth?

A. The requisition is written by the Wilson Packing Company in Memphis, and it is sent to their Chicago office. Their Chicago office in turn writes the purchase order and forwards it to General Tire & Rubber Company district office here, and then we are advised of this order and asked to deliver the merchandise.

Q. And where do you make the delivery of the merchandise?

A. We make the delivery to their plant at 1400 Warford.

Q. Is a part of that delivery the mounting of the  
47 tires?

A. Well, it isn't a requirement. It is quite a bit; in most cases they have a worn tire that needs to come off for recapping, and we solicit that recapping business and offer to mount this new tire in lieu of getting the tire for recapping.

Q. And if you mount it, do you also balance the wheels for the Wilson Company?

A. Not necessarily, not unless we are asked to, and that is a separate service charge if we do.

Q. Now, is Wilson Packing Company one of the largest of the national accounts that you service? I mean by that, do you supply more tires to them than you do to the average national account in your territory?

A. Well, I don't—I am not absolutely sure about that. From time to time they have seen fit to take their busi-

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ness away from General and buy somebody else's tires, so there are times that we are making deliveries and there are times that we are not.

Q. How about the Kroger Company? Is that a pretty consistent customer of General that you supply tires to?

A. It is fairly consistent, but there again the same conditions apply.

Q. Are their orders handled similarly to Wilson Company?

A. No. I believe their garage superintendent has  
48 the authority to place the order directly on a local basis.

Q. If the Kroger garage superintendent does place the order, how is the order written up and delivered to Kroger?

A. Well, I think in most cases we never see the actual purchase order. He will write out a purchase order, and he will call us or give us the order verbally to our salesmen, and he will give us the order number, and we place it on our national account delivery receipt that he signs.

Q. And does your service man or one of the employees from your company take the tires to Kroger and mount them on their equipment over there?

A. In some cases we mount them, and in some cases we just put them in his stock.

Q. Has that been a fairly regular part of your business during 1960?

A. Well, it is a very small amount. I wouldn't suppose we delivered them over 20 tires during the year.

Q. In addition to the new tires that you have delivered Kroger, you also do recapping for Kroger, I believe?

A. Yes.

Q. Now, do you bill the Kroger Company for the recapping you do for them?

A. Yes. That is our own business, yes. That is business



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we solicit from Kroger just like we would from you  
49 or Mr. Mitchell or anybody else that owned a truck.

Q. And you set the price on that?

A. We set the prices.

Q. So with reference to the new products that you deliver to Kroger, do you know what the price is which they are paying for the tire?

A. No, sir.

Q. I believe you said that part of the time you do mount the tires that you deliver to Kroger here on that national account, the new tires?

A. Yes.

Q. And when you mount them, do you balance the wheels?

A. No.

Q. Is there any other service performed in connection with the mounting of the new tires other than just putting them on?

A. We put air in them.

Q. Get them ready to go?

A. Get them ready to go.

Q. Now, when you deliver those new tires, are they the type that take tubes, too, the Kroger account, tires and tubes?

A. I am not sure whether they are using tubeless tires or not, but I don't believe they are.

Q. In any event, if there are tires and tubes, you  
50 deliver both and mount them in such a way as to make them ready for operation?

A. We do on the—in cases where we are getting—we render some extra service in order to get the man's recapping business, exactly like the fellow in the filling station wipes your windshield and he supposes you will come back and buy gasoline from him, so in order to get this man's recapping and other service business, we do some

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little niceties for him in order to influence him to buy products from us.

Q. Now, the new tires and tubes that you deliver to Kroger, I take it, are from your regular stock of new merchandise?

A. If we have them in stock, usually for convenience we deliver from our stock, and they are either replaced or we are given credit by General Tire & Rubber Company.

Q. Now, the type of tires that Kroger has used during 1960, I take it, are the usual types of truck tires that you handle and sell every day?

A. Yes, I would say so, yes.

Q. And would that be true generally with respect to the other national accounts, that they are all using products which you normally keep in stock?

A. In most cases, yes.

Q. And where you fill such an order for a national account, it is your general practice to take your stock, whatever you have in stock, if it is there, and  
51 supply the product they have ordered?

A. Yes, because we save a lot of time and expense by doing that rather than making a trip to North Memphis and checking the merchandise up in the General Tire warehouse.

Q. And you don't keep on hand any segregated stock out of which you supply the products to these national accounts, do you?

A. No, not unless it should be an unusual item that is normally not purchased by the general public.

Q. Do you have any national accounts that fall in that category?

A. At this particular time, no.

Q. Or in 1960 that you recall?

A. I don't think so.

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Q. And do any of these national accounts order passenger tires as well as truck tires?

A. Yes.

Q. Where they order passenger tires, is your delivery procedure essentially the same as with the truck tires such as you have described?

A. Yes, except in most cases they come after them.

Q. And they would be mounted and balanced there at your place of business, I suppose?

A. Yes, if they are willing to pay for wheel balancing or other services, why, we perform those extra services.

Q. If there are other services performed such as balancing the wheels, does this national account pay you directly for that extra service?

A. Yes.

Q. With reference to the tires and tubes that you deliver to a national account, I assume that those are products that you already have paid General Tire Company for or have already been billed for, whether you have paid the account or not? Is that the usual course of business?

A. Yes, in most—yes, I think it would be in every condition. In other words, every tire that we received.

Q. It is your merchandise?

A. They are billed to us.

Q. And it is your merchandise to deliver either to a national account or one of your customers as you see fit?

A. As a matter of record in order to receive our service commission, why, I think that is necessary.

Q. Now, what is this commission that you receive on the delivery you make to national accounts, Mr. Steepleton?

A. What is it? You mean dollar-wise?

Q. Yes, or percentage-wise during 1960.

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A. Percentage-wise, you mean how much the total gross amount of commission?

53 Q. No, just the rate of commission.

A. Oh, the rate of commission?

Q. Yes, sir. How are you paid for making these deliveries to the national accounts?

A. Well, we are paid on a sliding scale type of commission. That is, for instance, when we receive two and a half percent of a dealer price list—a dealer cost level, let's put it that way—on manufacturers' deliveries, and we are paid five percent on governmental deliveries, that is GSO; and ten percent on the other types of national accounts.

Q. Commercial type of national accounts?

A. Yes.

Q. Do you have any sort of written contract with General Tire & Rubber Company that prescribes the procedure by which you are expected to supply products to the national accounts?

A. We have no written contract. It is merely a mutual agreement to keep our relationship in good standing with our supplier to carry out the servicing of their direct customers.

Q. After you delivered, for example, a set of truck tires to the Kroger Company, what do you do with reference to General Tire Company in order to get paid for that transaction?

A. General Tire has a national account delivery receipt type of invoice which we fill out and show that we made delivery to such and such national account on their

54 purchase order number so-and-so, and we get some evidence of it by getting someone in that organization to sign that invoice, and we send it in to Chicago for us to receive our credit or replacement.

Q. Does General Tire Company then furnish you with

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any sort of document or credit memorandum or anything else showing how much they allowed you for the transaction?

A. We are issued a credit memorandum for the cost of the merchandise plus delivery commission.

Q. Whatever the applicable percentage is?

A. Yes.

Q. And that percentage would be based on your cost of the particular merchandise you supplied?

A. Yes, and we also have to supply a reference number showing when or on what invoice number we acquired the merchandise in the beginning.

Q. Is the price as shown by that invoice the price at which you are credited on your account with the value of the merchandise you delivered to the national account?

A. The price that they credit us with is the price we paid for it originally.

Q. Even though at the particular time you make the delivery, it might have been costing you some other price?

A. Yes. We have to furnish the stock movement  
55      number and they refer that back to their billing to arrive at the price they originally charged us for it, and they credit us back with the same amount.

Q. In sending delivery receipts such as you have described to General Tire Company, do you at the same time send any invoice or ticket showing the actual delivery of the merchandise?

A. Yes.

Q. That would be a copy of your sales ticket, I suppose?

A. A copy of our sales ticket is made out to General Tire & Rubber Company charging the merchandise back to them or getting it in some form showing that it was returned, and we get a credit for it.

Q. When you make out that invoice billing the General Tire & Rubber Company, do you specify on that the price of these particular items?

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A. You mean the price we pay for it?

Q. Yes.

A. Yes.

Q. Do you also put on there the commission that you expect to be paid for the particular transaction?

A. Yes.

Q. In other words, you make out a sales ticket or invoice then which reflects the amount of credit which you expect to be given for having delivered the  
56 particular merchandise to the national account?

A. Yes.

Q. After you have completed that invoice and sent it to General Tire, if you wanted an early replacement of the merchandise that you have delivered to the national account, do you prepare or do you make a separate order to the district manager or to someone else telling him you need some more of that particular item for your stock?

A. Yes.

Q. Where do you send the credit transaction, your delivery receipt, to? Does that go to the district office?

A. It goes to the district office.

Q. But that in itself would not be an order for some more merchandise?

A. No.

(Off-the-record discussion.)

Q. (By Mr. Tencher) With reference to the recapping which you do for Kroger, for Wilson, and others of the national accounts, are you free to set the price of their recapping without regard to any prices that General Tire Company might negotiate with these national accounts?

A. Yes.

57 Q. How does that price compare with the price which you would charge for recapping that you do on a similar size truck tire for some truck operator who has got only one or two trucks?

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A. Well, it depends an awful lot on some national accounts we have. We handle the service for them, the mounting, the dismounting, the same as we do on an individual, and in that case we charge the same prices.

Q. Is the price you charge then determined by the service or extra work that would be involved?

A. Yes.

Q. And is it without regard to the number of vehicles that the particular customer operates?

A. Yes.

Q. Is that termed a commercial price on recapping?

A. Well, we have our own commercial prices, yes, that we charge everybody, every account that we make without an exception, that we handle the servicing, we do their mounting, dismounting, the mating and matching, the airing, the road servicing, all the things that are necessary to perform in the function of the truck tires. Now, we have some cases where for reasons of their own that they would rather perform their own servicing, or perhaps because they have a union arrangement, they won't permit us to handle service, why, we make a differential in the price on a pick-up and delivery basis.

58 Q. Do you have very many such commercial customers where you have this price differential and do not perform the service that you have described?

A. Very, very few, not over—in 1960 I don't suppose we had over two that I can recall, and currently we don't have over four or five right now.

Q. What approximately would be the price differential there, Mr. Steepleton?

A. Well, it could be anywhere from 10 to 15 percent, depending on the service that they demanded and the number of hours that it took your people to stay there and perform extra functions.

Q. Perhaps I didn't understand you, but I understood

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that you have a commercial price for recapping, which is the same regardless of the number of vehicles your customer has, provided you also render this extra service of mounting or mating and matching and airing, is that correct or not?

A. That is correct.

Q. All right. Then for those few customers where you do not provide the extra service, you will reduce the recapping cost by 10 or 15 percent from your commercial price list, is that correct?

A. Well, we use—it could be—I am trying to think. We use a suggested factory list in those instances, and  
59 their relationship to our list varies considerably from one type tire to another.

Q. But in general, you think it would run from somewhere in the neighborhood of 10 to 15 percent lower?

A. That is the difference in the cost of the performing of the services.

Q. In other words, you do then figure into your cost of supplying the recapping service plus the cost of the extra service of switching and mating and matching of the tires and airing the tires, all of that you compute in setting the price for your large commercial accounts?

A. Yes.

Q. Would you be able to give us the names of several of your larger accounts? I mean those which have 10 or more vehicles for which you regularly do the recapping plus the extra service?

A. Well, I don't know how many vehicles that any of them have, but I am sure it is a matter of record. You already know of some of our larger accounts, and I think Southwestern Transportation Company would probably be our largest.

Q. There is no question but what they have 40 or 50 vehicles at least? I don't know how many.



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A. Well—

Q. No question but what Kroger has well in excess of 10 vehicles?

60 A. Yes. Well, however, we get a very little, very small percentage of Kroger business. Their business is divided among five or six different companies sometimes.

Q. It wouldn't be any question but what Wilson Packing Company operates well in excess of 10 vehicles?

A. I am sure they do.

Q. And Stewart's?

A. Yes, sir.

Q. And Continental Baking Company?

A. Yes, sir.

Q. And Road Builders Equipment Company?

A. They wouldn't operate any. I say any—they have a few vehicles of their own that haul heavy equipment, but they are equipment dealers.

Q. Yes, sir. Then such business as you do for them would be in the nature of recapping of tires to be used, to be put on used equipment which they would resell?

A. Some would, and some would go on their own equipment.

Q. Similarly, for Tri-State Mack the bulk of your recapping would be on tires to be put on used equipment for resale?

A. Well, no. During 1960 Tri-State Mack was operating a leasing company, and some of the tires were run on that equipment and some went on used equipment.

Q. For resale?

A. Yes.

61 Q. And I take it that there would be no question but what DeSoto Ready-Mix Company operates more than 10 vehicles?

A. I don't believe they do. I think they have less than that, considerably less than that.

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Q. Are they here in Memphis or Shelby County?

A. Yes, they are somewhere south of Whitehaven, right at the state line.

Q. I suppose you would know that Delta Oxygen Company has more than 10 vehicles, would you not?

A. No, I am not sure, no, sir.

Q. You think it might be less than 10?

A. I think it might be less.

Q. How about John A. Denie's & Sons Company?

A. I am sure they have more than that.

Q. And how about Ray D. Carter?

A. In 1960 Ray Carter—I don't know; he just started in business, and I don't know how many vehicles he has.

Q. He had a hauling business plus a leasing business, I believe, didn't he?

A. No, Carter Leasing Company is a different company.

Q. Is it? Do you know whether Mid-South Aggregates has more than 10 vehicles?

A. I don't know. A lot of these companies operate leased equipment, and it also depends on what you  
62 call a vehicle. There are tractors and there are trailers, and you only license one of them, and I don't know how to tell how many vehicles a person has, and there are some companies who own only trailers and all the pulling equipment is leased from individuals or from one company.

Q. At any rate, Mid-South Aggregates provided you with a pretty substantial amount of business, and had a fleet of vehicles of some number that would be more than four or five?

A. Well, they run a construction business, and they had some dump trucks and earth moving equipment, but I don't know how many.

Q. And how about Littlejohn Taxi Company?

A. They have several taxis; I don't know how many.

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Q. I suppose United Taxi Company has 10 or more?

A. I think so. We keep no record of how many vehicles any one customer has.

Q. If you have a customer for whom you do recapping service who has only one or two vehicles, say, an individual with his car, or an individual truck owner-operator, as a part of your recapping business do you perform this regular service of airing his tires and matting and matching his tires and so on at no extra charge?

A. To what extent we can, yes, sir.

Q. But your larger recapping customers, you have  
63 employees who go around to the place of business to check their tires and air them and mate them and match them and so on, do you not?

A. We do. We also in our regular tire, passenger tire business, have our customers come in and have their tires rotated and checked periodically. Every customer is sent a notice at, I think either three or four months, putting him on notice that his tires have probably gone another three or four thousand miles and that he should come in and have them rotated and inspected, and we perform this service consistently for all type of customers.

Q. Without charge?

A. Without charge.

Q. Now, in performing the rotating and matching service in the customer's place of business, you have a published price for the service unless it is under this arrangement where it is provided free?

A. We have a list for performing services for persons who are not our customers as such. Quite often a person will call us to advise us he has a flat tire or to perform some service that has never bought a tire from us. He is in trouble; it is an emergency, and, therefore, we make a charge for it.

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Q. Now, in connection with the Southwestern  
64 Transportation Company, I believe you keep an  
employee down at the place of business every day,  
do you not?

A. Yes. Those trucks come in and out of there at all  
times of the day and night, and in order to handle the  
volume of business that we get from there, it takes well  
over a half-day. We have a man that goes down there  
in the morning, and I believe he gets there at seven  
o'clock and he performs whatever jobs are to be handled  
there up until the middle of the morning, and then he will  
get away from there for a couple or three hours and then  
go back, and another group of equipment has probably  
come in in the late afternoon.

Q. Does the service at Southwestern Transportation  
Company include removing flats and repairing punctures  
at no extra charge?

A. I believe that they do their own tube repairing down  
there. I am not sure; I am sure if we bring them in and  
repair them, we charge them for it, but I believe they  
do their own repairing.

Q. What would be the extra service amount to or what  
would it involve at Southwestern?

A. Well, the number or amount of equipment they  
operate, there is enough turnover of equipment in there  
from day to day that we are pulling tires off for recap-  
ping every day.

Q. In addition to that, you are checking the air  
65 pressure and you are rotating the tires to get  
maximum wear, and you are mating tires so that  
on dual wheels the tires will both carry their proper share  
of the load and things of that type, is that involved?

A. Yes, sir.

Q. Do you have any sort of mileage guarantee on your  
recapped tires for any of your customers?

A. We have a standard guarantee to everybody that

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we will guarantee them for, in cases where they keep mileage records, we will guarantee them **on a mill a mile.**

Q. On any and all your customers?

A. In most cases on over-the-highway operations, and there again the guarantee must fluctuate according to the type of service, the tires and all, and that is a standard guarantee we give to everyone.

Q. Is that guarantee given in writing to your various customers?

A. No.

Q. It is just understood?

A. It is just an understood thing.

Q. Who is the employee that regularly services tires at Southwestern Transportation Company for you?

A. Do you mean the salesman?

Q. No, the service man that changes tires.

66 A. Well, that changes from time to time. We may have one man down there for a week and change, or he may be there three months and change, but that is not a consistent thing.

Q. Is the Southwestern Transportation Company the only one of your customers for whom you provide this service on a daily basis?

A. I would say Southwestern is the only customer we have that we get sufficient amount of business from to warrant daily service, and we probably have others that we are called to perform some type of service nearly every day.

Q. By "some of this type of service", that is free service?

A. Well, there isn't anything free. We are getting paid for it because we get a sufficient amount of business at a profitable price to justify the service.

Q. Yes, sir.

A. The service this customer gets in relation to "Joe Doakes" with one truck is all relative.

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Q. But by free, I meant at no extra charge for sending a man to the place of business and changing the tires and matching and mating of tires and checking the air pressures and so forth. Are there other customers that you do that for without extra charge on a daily basis?

A. We go to John A. Denie's Ready-Mix Plant daily, and we go to Weymouth Construction Company.

Q. Any others you recall?

67 A. I don't know; I can't recall any others right now that we are currently doing that for, but we do it for anybody where the business and the necessity warrants it. We would do it for you.

Q. If my volume of recapping was such to make it worthwhile?

A. That's right.

Q. Now, many of the other customers for whom you do recapping, I assume, you provide this checking service and changing of tires and so on at no extra charge, less frequently than daily, and I have in mind some of your customers for whom you do it every week?

A. Yes, sir, and I think the same thing would apply that if you drove your automobile enough that you had to buy gasoline every day, you would get your windshield wiped off every day and your floor swept out every day and your oil checked, but if you drove your car only enough where you had to give us your car once a week, why, you would probably get that service once a week.

Q. Now, you are giving me an example though of a service that is performed at the place of business where I buy the gas, but here my questions relate to the service as performed at the customer's place of business, rotating the tires and mating and matching the tires and so on, taking them off and bringing them to your shop and taking them back and mounting them, which is not done at your place of business. Now, is that

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the type of service that you do on a weekly basis for many of your customers?

A. Well, our purpose in going to anybody's place of business to do anything is to get tires to recap, and we certainly are not in the business of checking air pressures and fixing flats and for any other reason other than to get tire business, and some people, some size accounts require this service daily; some require it semi-weekly, some require it weekly; some require it monthly, and probably in the case of the man with one truck, we may not see him over every three or four months.

Q. And in that type of situation when you do see him, he would normally come to your place of business rather than you sending a man out to his place of business?

A. Not necessarily, no, because in the first place we don't have the room to service trucks at our place. We have a terribly congested situation, and while occasionally the trucks drive in there, we prefer to service it away from our place.

Q. If he is an operator of one truck though, would you charge him for a service call though if you go out to match his tires or pull one off?

A. Not if he was operating our tires. If he had  
69 our tires and our recaps, it is our obligation to make them perform.

Q. Well, that would be in a situation where I assume that the tire had given away before it should have. Suppose he has a set of your recapped tires which in the normal course of his operation is simply worn slick again and are ready to be recapped a second time. Do you wait until he calls you to go out?

A. Not necessarily. Our salesmen are probably in contact with him. They have a card file on him, and they know substantially how many miles they operate in a month, and they have got a pretty good idea of when

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this man is going to be ready for tires again, barring any unforeseen accident in between time, so they stay in contact with him and they pretty well know when he is in the market for some additional service or merchandise.

. . . . .

**Direct Examination,**

By Mr. Tencher (Continued):

Q. Mr. Steepleton, I would like a little more clarification with reference to the daily or weekly services, as the case may be, that you provide to various of your commercial accounts. I believe you stated earlier that even though no separate charge is made for these services, that they are not free services, and would you elaborate on that just a little bit?

A. Well, now, let's look at it. We look at it this way. You see, a lot of these trucks—in other words, you are trying to draw a comparison between what we do for Southwestern and what we do for somebody else.

Q. Yes.

A. Now, the very nature of their business makes or causes a differential there. Those trucks that belong to those people come into their terminal at all hours of the day and night. More particularly we find a certain group of them there in the morning, and then they will be loaded and go out, and another group will be there in the afternoon, so the nature of their business requires constant surveillance plus the fact that there are a lot of trucks involved, and there are other types of commercial accounts whose trucks are constantly in operation throughout the business day so that the only time we can see them is on Saturday, so as a result in order to get to those trucks and pull tires off for recapping, we have to go see those particular trucks on Saturdays



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71 because we can find a group of them together and we can more readily do a good job on mating and matching tires by virtue of having more than one truck to work with at one time.

Q. Would Mid-South Aggregates be a fair example of one that you perform that service on a weekly basis?

A. Mid-South Aggregates and one of their other companies are strictly on a C. O. D. basis. They owe us about \$15,000 and we will never get a dime out of it, and we are currently not doing business with them.

Q. Could you name one that you do handle on a weekly basis?

A. That we go by and see if their tires are available for recapping on a weekly basis, yes, I think that you named one a while ago.

Q. DeSoto Ready-Mix?

A. DeSoto Ready-Mix would probably be one, yes.

Q. In addition to checking to see whether the tires need to be pulled and recapped, you do match and mate tires of all various vehicles?

A. On that particular day if there wasn't anything that needed it—we very seldom go into the function of matching and mating tires until we are ready to mount some new tires or some recapped tires, and that is part of the proper application of the truck tire, is to be sure that it is running beside one that is of comparable size and tread design.

72 Q. And in doing that, I suppose that you are rendering a valuable service to the customer to prolong the life of his tires and to reduce uneven wear and things of that nature?

A. That is our intention, yes, sir.

Q. And would it be correct to say that in providing that service, either on a daily basis for Weymouth Construction Company and John A. Denie's, for example,

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on a weekly basis for DeSoto Ready-Mix and other of your customers, that it cost you a substantial amount to provide the service?

A. Well, the service is always relative to the amount of business involved, whether it be new tires or whether it be recapping.

Q. Yes, sir, and in any event, the checking of the air pressures and the mounting of the tires, the matching and mating of tires there at the customer's establishment, is a service that you do not provide for an average, individual customer?

A. We will provide it for anybody that requires it as a part of their business.

Q. At the customer's place of business?

A. At the customer's place of business.

Q. Well, can you give any examples of individuals for whom you provide this matching and mating service of tires, and if so how?

73 A. We have quite a number of individual milk haulers that haul milk into the dairies. Now, while we don't go to that man's home at Collierville or some other town or community that he might live in to perform this service, we go out to the dairy while he is unloading and perform this service.

Q. Does he call you to come and do that?

A. Sometimes he calls us, and sometimes our salesman has contacted him, and he meets him out there and finds things to be done, and we go out and do it. There are a number of individual truck operators who have in the past leased to automobile carriers. They own one truck. We will go to usually Commercial Carriers or Dealers Transport or wherever this man is basing his operations, and perform these services for him.

Q. Would that be on a call basis rather than going periodically by prior arrangement?

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A. Well, I wouldn't necessarily say so, because our salesman is down there contacting those people, but I suppose if he had a flat tire out here with a load on it and he is in trouble, then he is calling us.

Q. But otherwise you wouldn't know—you could see that fellow at a particular time or each week, on the same day of each week to perform that service?

A. That is my salesman's obligation to follow that customer and determine what service he needs when.

74 Q. Then the service call or your service truck to perform the matching of tires or the removal of a tire would be at the instance of one of your salesmen rather than being dispatched on a schedule basis?

A. Well, that is true with the others, too.

Q. Would John A. Denie's, for example?

A. Our salesman is responsible for what happens there. He is the person responsible for establishing the requirements to properly service this customer.

Q. And this particular customer, the requirement is to go each day, isn't it?

A. That is correct.

Q. And your service truck does go each day without special call or being sent specially by the salesman, isn't that right?

A. Well, he goes each day. Now, if you want to get technical about it, somebody told him to go.

Q. But there is a distinction, is there not, between the arrangement whereby your service man goes to John A. Denie's and the arrangement by which a service man goes to the Transport Dealers' establishment?

A. Basically I can see no distinction, and again the service rendered is relative to the amount and type of business involved.

75 Q. In one instance it is on a regular basis and in the other instance it is on an irregular or individual and specially set schedule?

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A. It is regular because the requirements cause it to be regular.

Q. Now, I believe that you have many of your fleet account customers who in addition to the recapping service you provide, buy their new tires and tubes from you, is that correct?

A. Some of them do.

Q. Now, do you have your commercial salesmen to call on those accounts with reference to selling them the new tires and tubes? Is that part of the salesmen's function?

A. That is part of their function.

Q. And is the salesman authorized in advance to arrange the terms of the sale, for example, the code less 40 percent or code less 50 percent, or whatever the price might be at that particular time?

A. Well, they are authorized usually within certain limitations to quote whatever price is necessary to get the business, and that thing fluctuates from day to day, so I never know the prices myself really.

Q. Is it the normal thing for the salesman to check with you with reference to each major sale that he would make, say, to one of your commercial accounts?

76 A. Well, they occasionally advise with me on what we are up against, a competitive situation that hasn't previously existed to our knowledge, and I am advised of it, and we will confer on what we can do in order to take this business and still make a little profit on it.

Q. And the price that you would agree upon with that customer for his fleet of several vehicles would be normally a lower price than you would charge for an operator of, say, one truck?

A. Well, not necessarily, because of competitive conditions, the lowest available prices to fleets the size of Gordons Transports are being extended by our competitors to one truck operator.

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Q. On occasion, is that right?

A. Yes, sir.

Q. But as a general rule, wouldn't it be true to say that your fleet accounts buy at lower prices than individual truck owner-operators buy?

A. It depends. Quite often prices are made not in relation to the size, but in relation to how the man is going to pay. Some people who are able to pay their bill on the 10th of next month might be extended a little bit better deal than the guy that wants to take six months paying for it.

Q. But when all those factors—— (interrupted)

77 A. But in either case, they are a retail sale because they are being sold to a consumer, and the price has nothing to do with it.

Q. And that is your interpretation of retail sales?

A. Right.

Q. Without regard to that, where the terms of the sale are similar with reference to the time for payment, and where you have a customer with a fleet of 10 or more vehicles, isn't it the normal thing for that customer to get a lower price, to pay a lower price for your new products than other customers buying the same size and type of tire, but he is operating only one vehicle?

A. Well, it isn't my theory of business to operate in that way. Certainly it is true that competitive retail prices force us to make some differential, not because he has more trucks, but because he buys more tires. Maybe he is willing and able to pay for them immediately, we may have some distress inventory here that we want to move, and we might have a very logical reason to cut the prices a little bit to get him to take an extra few tires.

Q. But whatever the reason is, wouldn't it be fair and correct to say that as a normal part of your business, the fleet operator gets a lower price per tire than the individual truck operator?

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78 A. Well, there again I don't know what you would call a fleet, because I can't see any difference between why a man should have a different price if he owns nine trucks, and over here he has got ten.

Q. Well, let's take the situation—— (interrupted)

A. We will say in our business the size doesn't regulate the price. The marketing conditions regulate the price.

Q. Well, whatever regulates the price, let's take a situation of an owner of ten or more vehicles as distinguished from an owner-operator of one vehicle. Isn't it the normal thing for the operator of the fleet of ten or more to buy his tires from you at a lower unit price than the operator of the one vehicle?

A. Well, it is normal that we are going to try to get more.

Q. Well, would you go ahead and answer the question and tell me whether as a normal thing it doesn't occur that way?

A. Well, I can't say that it actually does, because we have many customers who have more trucks than you are quoting as a fleet number.

Q. Yes, sir.

A. —who are paying more for their tires than in some instances the man that has one or two trucks.

Q. Is that a normal situation?

79 A. I don't know that it is normal. There again I am trying to convey to you that the marketing conditions from day to day and from customer to customer fluctuate and change by the hour, by the day, and by the week.

Q. I still don't believe we have an answer to the question as posed, namely, that at any given time on any particular day, whether the normal situation is for the fleet operator who has not less than ten vehicles and any number that you may select larger than that, whether

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on a given day that person, that fleet operator, would normally buy his tires at a lower unit price than the operator of a single vehicle?

Mr. Mitchell: I think the record reflects that same question some five or six times.

Mr. Tencher: I concede that.

Mr. Mitchell: And since his additional explanation—  
he gave an explanation first as to why he found it impossible to give an empirical or definitive answer on that, and he has elaborated on his inability four or five times, seeking for him to explain why an answer cannot be given, that is, in express terms to the question as you have phrased it, but I think after this one further attempt, I believe we should move on to something else.

Mr. Tencher: The question certainly has been asked.

I have attempted to express it in different words  
80 in order that I may get across to the witness the information that I am seeking, but so far I don't believe the question has been answered, or to my mind satisfactory explanation given for not being able to answer it.

Mr. Mitchell: I believe in essence the witness has stated that if you are talking about a single isolated sale of a tire or tires for one vehicle to the owner of one vehicle as compared with the single isolated sale of a tire or tires to the owner of several vehicles, and it has been repeatedly explained why there is no normal selling price in such a transaction in Mr. Steepleton's experience in the tire business.

Mr. Tencher: Let's see if we can get it in this way, Mr. Steepleton?

Q. Would it be correct to say that in the normal course of your business, you do from time to time and frequently make sales to fleet operators of more than ten vehicles for commercial purposes?



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A. Well, I am sure we do. I have no record of the number of vehicles they have, but I am sure that some we have fall in that category.

Q. You know that many of your customers fall in that category?

A. Yes, sir.

81 Q. You also are aware that as a regular and recurring part of your business, you make sales of tires of the same size and quality to individual truck operators, don't you?

A. Yes.

Q. Now, my question is, assuming—and I think this would be a fair assumption that on any particular given day, you will have sales transactions involving both types of customers that we have just described, would that be true?

A. Yes.

Q. Now, isn't the nature of your business such that you could give a fair appraisal of what would be the normal manner in which those two types of transactions would be handled?

A. Well, in either instance our salesman would try to get the highest price that he could.

Q. Yes, sir.

A. But in either instance also, he would probably sell either one of them at the lowest price.

Q. There would be a certain area within which the salesman would be free to adjust and bargain as to price?

A. That is correct, because that salesman is paid a percentage of the gross profits.

Q. Yes, sir.

82 A. —and the higher price he can collect, the more commission he makes, so every time he gives away ten percent, he gives away part of his commission.

Q. Is he paid a percentage of the gross profits on each transaction, each sale?



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A. Yes, sir.

Q. All right, and within certain limitations he will adjust the prices for either of those two customers?

A. Yes, sir.

Q. And he makes sales of both types from day to day regularly as a part of his business?

A. Yes, sir.

Q. Now, are you familiar enough with the way your salesmen are making those sales that you could give a fair appraisal and tell us whether as a normal proposition the sale to the fleet owner with ten or more vehicles would be at a lower unit price than the sale to the individual truck operator?

A. Well, I don't think I can.

Q. Why not?

A. You are talking about in units, in dollars, in number of customers, or what is your basis for the question?

Q. Simply the unit price of the same type of tire that he might sell at any given day to the two classes of your customers that we have defined.

A. I think I have already answered that question.

83 Q. No, sir.

A. That he is permitted, or he knows his cost. He is paid on a gross profit basis. He is going to try to get the highest price he can from either category, and that if he gives away any of our gross profit, he gives away his commission.

Q. You have explained that.

A. So he is permitted to take the deal at any price within a certain scope that he has a mind to, in order to secure the business.

Q. Yes, sir.

A. —and the price that he quotes is almost entirely regulated by what our competitor is doing, and our com-

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petitor is selling the one truck operator at the same price as the guy with 100 trucks.

Q. You have explained that.

A. Even though their company policy may say no, they are finding ways to get around it and are doing it.

Q. But what you have not answered is what the normal or based on an average, the sales your salesmen make to the fleet operator would be at a lower unit price than the sale that he made to the individual truck operator?

A. I don't have those figures.

Q. Wouldn't you be able to tell from your over-all knowledge of how those sales are made, how they compare?

A. Well, we are talking about today, we are talking about yesterday, we are talking about 1960?

Q. Any of those times.

A. I know that in the most recent months, the individual truck operator has been buying right down to the bottom deal in many, many instances.

Mr. Mitchell: I believe that is as clear and elaborate an answer as he can give. I don't think we need to tarry any longer with that proposition. I think the record now reflects a frank statement by the witness that he is not able to answer, does not have the figures available and that with respect to his general recollection that the current experience is that they are buying, that is, these two types of consumers are buying at the same prices, and that if that is normalcy, your question requests normalcy, that is what it is.

Mr. Tencher: I can't accept counsel's interpretation of the answer, but I believe that with what the witness has said, I am ready to pass on to something else.

Q. (By Mr. Tencher) Do you from time to time, Mr. Steepleton, mail out to your larger commission customers a quotation of prices at which you can supply their needs for the immediate future?

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A. No.

85 Q. Have you not in recent months, for example, put in writing the basis on which you could sell tires, say, to Weymouth Construction Company or to John A. Denie's Sons Company?

A. Not that I know of. The only thing in that category could be that perhaps in some of our advertising in the newspaper on passenger car tires, our salesmen have maybe sent out a pre-advertising—pre-sale notice that we are going to run a sale on such-and-such tire at such-and-such a price, but I have no knowledge of any such thing as you are referring to.

Q. Are your salesmen authorized to quote prices or offers in writing over your signature?

A. Well, they are not authorized to do it. They might do it. If I have made any written quotations in the last—over how long a period did you say?

Q. I didn't specify, but I have in mind going back to some time in 1960.

A. Well, it is possible that we might have been requested to submit a bid that was current for that particular day or month. I am sure we have.

Q. All right, but other than that, you have not made it a practice, I take it, of soliciting business in writing by making a blanket offer?

A. No, sir.

86 Q. Does General Tire Company territorial manager, that is Mr. Meeks, I believe you said?

A. Meeks, M-e-e-k-s.

Q. Does he ever help you or your salesmen in contacting a fleet account and trying to make sales in the business of tires and other products?

A. His function is to assist me or our company in training salesmen or to help them in making a sale and rendering product knowledge and quite often engineering knowledge, as the case may be.

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Q. Now, in this competitive situation you have described previously, your salesmen occasionally find either your own customers being offered tires at a price that you can't meet, or potential customers that you would like to sell that have been quoted prices from a competitor that you under the normal situation cannot meet. Do you at such time arrange to have your territory manager help to work out an arrangement with that customer so that you can meet the price you have to?

A. Well, we, my salesmen and myself and all the field organization of the General Tire & Rubber Company are certainly alert to the marketing conditions and what competitors are doing, and there again, to show the instability of the tire pricing structure, we will call on the factory representatives to see if we can get a  
87 price to meet a competitive situation.

Q. And is that sometimes done, that you will get a special price for a particular customer in order that you can get the business?

A. Yes.

Q. And when that is done, is it necessary that some agreement or arrangement be put in writing as between you and General Tire Company with reference to that particular customer?

A. No.

Q. Do you have any such customer at present to whom you sell on a fleet account basis where the price that he is paying you had to be worked out with General Tire Company?

A. Well— (interrupted).

Mr. Mitchell: Let me ask for a clarification of that question. Does it import the idea that there will be a continuing availability of tires at some such price to a particular customer?

Mr. Tencher: That is what my understanding is.

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Mr. Mitchell: On established accounts receivable now?

Mr. Tencher: No, I have in mind a continuing situation.

Mr. Mitchell: Within that frame of reference and my understanding of it, go ahead with the answer.

88 A. I don't recall what the marketing situation was in 1960 in the period we are talking about. I am sure some of those conditions existed, but I can't recall right now exactly who they were or what the conditions were.

Q. One I have in mind—— (interrupted)

A. But they have been existing for off and on.

Q. Yes, sir.

A. (Continuing) For a number of years, as you probably no doubt have found out.

Q. Ray Carter was one in that category, I believe.

A. The marketing situation in the tire business has been such for the past two or three years that competitive pressure has forced the retail price down below what we were normally supposed to pay for tires.

Q. And, for example—— (interrupted)

A. So at some periods of time during the past year, we might have been selling a lot of people at some prices below what we will say it is supposed to be.

Q. In fact, in some instances has the price been below what you normally are billed for the same item?

A. Yes, sir.

Q. Was Ray Carter in that category for the same period of time?

A. I don't recall exactly the name of the accounts, 89 and I think it is irrelevant.

Q. Well, I would perhaps agree with you except I wanted to use that one for illustration purposes. If it was true, it was carried on your records as a category 4, and I believe you explained that that meant he had a special 10 percent additional discount on something that had been arranged with the company?

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A. It is possible that that was true.

Q. And whether or not that particular one was involved and so classified, is that the situation you were describing that you have had various accounts that continued over a period of time with a special price that would either be below your price or below the price to which you could sell to the customer and make a profit?

A. Well, I wouldn't say that the—I can't define the length of time because these marketing situations in the tire business fluctuate. We get a period of very soft prices, and all of the rubber companies are participating in a soft market situation. All at once our company will say "No more deals", and you are back operating within your regular buying price, and we try to uphold that situation until the dam breaks again, so this thing fluctuates up and down.

Q. When there is such an arrangement made with  
90 General Tire Company to permit you to sell at a rate lower than you normally sell, how are you protected so that you can still make a profit on that transaction?

A. We advise them that the competitive quotation is such-and-such, and we tell them who the competitor is that is quoting the price, and then they bill us the merchandise at 10 percent below that figure.

Q. Now, do you have to furnish General Tire with some written evidence that this competitive situation exists?

A. We don't furnish it, no.

Q. But you work out your arrangements through the district manager, I presume?

A. That is correct. The district manager and all of the district managers nationally are usually aware of the marketing situations that exist throughout the nation, and when the same thing crops up in Memphis that is going on in Detroit, they know beyond a shadow of a

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doubt that we are not—that we are giving them the true information on that and usually go along with it within certain limits.

Q. Now, in what way does General Tire distinguish the particular products you are selling to this account so that you will be billed at 10 percent less than your usual billing for the products going to that account, but not the products that go to regular accounts?

A. By order, by a specific order.

91 Q. Then do you supply these special accounts on special order, or do you supply them from your regular stock and then advise the General Tire Company of how many tires of the particular kind that you supply to that customer?

A. That could be either way. In any case we will either pick them up and make a direct delivery, or we will replace our inventory.

Q. In what way would that transaction be handled differently from the transaction involving the delivery to a national account?

A. Well, in 1960 I think they were handling it in a similar basis to a national account, the accounting procedure, but currently they are billing straight off the invoice.

Q. In 1960 then would it have been your practice to report the transaction on a national account delivery receipt form?

A. No, oh no. We would set it up on a claim account.

Q. On a claim account?

A. The fact of the matter is, the commission is not the same thing, but similar, but it is on a claim account rather than a delivery receipt.

Q. But the difference would be that you would bill the customer in that instance, would you not?

A. That's right. The difference is that that customer



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is our customer. He is our retail customer. The national account is General Tire's customer.

92 Q. Whether or not he is retail or wholesale or some other basis, you are the one who bills them and you are the one who collects from the customer?

A. Right.

Q. Now, your records indicate that you do a considerable amount of business selling to the City of Memphis. Is that still true?

A. We do some business with the City of Memphis. I think that—I don't know what our total dollar volume is, but about \$15,000 a year is strictly service charge.

Q. And some of it is new tires?

A. Some of it is new tires and some is recapping.

Q. Is any part of that business obtained on a competitive bid basis?

A. All of it is, that is, all of the new tire and recapping is on a bid basis.

Q. Now, in your business do you treat these sales to the City of Memphis on a bid basis as wholesale sales or as retail sales?

A. Retail sales. They are consumed by the City of Memphis and, therefore, are retail sales.

Q. In your classification?

A. Yes, sir.

93 Q. How does the price that you charge to the City of Memphis compare, for example, with the price that you charge to the United Taxi Company?

A. Well, I think since it is a bid proposition, I imagine that it is lower.

Q. The price to the City of Memphis would be lower?

A. Yes, sir.

Q. Now, does the City also buy truck tires from you?

A. Yes, sir.

Q. And those truck tires that are sold on a bid basis,



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would the price to the City of Memphis be less than the price, for example, to John A. Denie's Company for comparable tires?

A. Well, for anyone the normal would be that it is lower. I imagine that sometimes during the extreme pressure of competitive situations, that the reverse might be true.

Q. Yes, sir.

A. I have no—I can't recall the exact figures.

Q. All right, sir. Could you say whether the sales to the City are just for the purpose of delivery or does it involve mounting and balancing of wheels and so on?

A. Delivery only, with the exception of some cases they request in the bid that tires be mounted, but normally it is a delivery proposition.

Q. And you spoke of some \$15,000 a year being servicing and recapping business.

94 A. Let me qualify that. Probably I said \$15,000 of it would be service, and I may be a little bit high, but usually somewhere in the neighborhood of between \$12,000 and \$15,000, that is service.

Q. All right, now, what does that involve?

A. That involves the service trucks and men that we have doing service work for the Public Works Department.

Q. Would you elaborate a little bit on that? What sort of service work is that?

A. Well, they buy all of their tires on a pick-up and delivery bid basis, not only from us, but from many other companies, and those tires are delivered over there, and our service men do all of the mounting and the dismounting and the flat repairing and all the necessary tire maintenance work.

Q. Is that normally done at the City Garage?

A. Normally most of it is done there or at various places where they have equipment stationed.

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Q. How many service trucks are you operating? Let's say how many trucks did you operate in 1960?

A. Eleven, I think.

Q. Are those service trucks equipped with a two-way radio?

A. Most of them are, yes. I think all of them but one.

Q. I assume that is still the situation?

95 A. I believe we have 12 now.

Q. Your records indicate that you occasionally have sold tires in 1960 to the United States Post Office Department. Could you state whether or not that was under a national account basis or some other basis that you made those sales?

A. It would be a national account basis on the new tires, and if we did any recapping or service work, that was strictly a local basis.

Q. If you did any such recapping, did you set the price, or was it done at a price which was set by the Federal Government?

A. We set the price.

Q. You also have sold tires to the State of Tennessee, I believe?

A. Yes.

Q. Could you state whether those were sold on a bid basis or some other basis?

A. Well, the rubber companies all print a suggested state price list wherein the various states will buy tires at a certain price. Now, some states accept that, and some of those don't and put out separate bids.

Q. Does the State of Tennessee accept it?

A. The State of Tennessee accepts the accepted state price list. The City of Memphis doesn't.

96 Q. In other words, when you make a sale to the State of Tennessee, I assume you make it on this state list price basis?

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A. Yes.

Q. Do the various counties that you sell to also buy on that state list price?

A. Well, they are entitled to and also tax free. In other words, they don't pay excise taxes under your Government body. The Federal Government pays excise taxes; the states, counties, cities and any other tax supported organizations are exempt of Federal excise tax and the sales tax. Some counties accept the state price. Some counties don't and ask for bids. Others where we are rendering them service, they pay higher than the state price and pay our regular commercial prices.

Q. And that would include Fayette County, Tipton County, and Weakley County among your customers?

A. And Gibson.

Q. And Fayette?

A. I am not sure about Fayette. I don't know; there are two or three of them that pay a little higher prices because we send our truck instead of them having to pay freight to a remote city up here, why, we deliver the tires and in most instances mount them for them, and they pay a higher price than state prices. Our  
97 arrangement with them on the recapping is the same as any other customer, any other individual.

Q. Does the Dyer County buy on the state list?

A. I think so.

Q. Lauderdale County?

A. I think so.

Q. And Mississippi County in Arkansas?

A. Mississippi County doesn't buy any new tires from us. That is all recapping, and in most of these counties, Gibson, Fayette, Weakley, all the rest of them, the most of it, the high percentage of dollar volume that Mr. Micklish shows in his audit is recapping and service function.

*Deposition of Mr. A. E. Steepleton*

Q. I assume that since you were testifying from memory that if your records show sales of General truck tires, for example, to Mississippi County, even though that might be reflected and the most of the business is recapping, that that would indicate a sale of a new tire?

A. Yes.

Q. And Quitman County in Mississippi is another one for which you do both recapping and selling of new tires?

A. Yes.

Q. Do you know whether they buy their new tires on the state list price?

A. I believe that all the Mississippi counties buy  
98 on a bid basis; I am not sure.

Q. How did you receive the bids and the invitations to bid?

A. They have an invitation to bid annually, and the bid amounts to merely a formality that we file a price list with them, and I presume the other bidders do, too, and then they make their request or requisition from whomever they feel like they want to give the business to.

Q. Do your commercial salesmen call on the appropriate officers in these various counties to get the business?

A. Yes, sir.

Q. Is that essentially the way in which the Memphis bidding is done?

A. No, the Memphis bidding is by mail.

Q. All right, sir.

A. No solicitation.

Q. And by and large, you would say then the state list prices are lower than the commercial prices at which you sell to various fleet accounts as a general proposition?

A. Well, they are supposed to be as a general proposition. Currently, I am not quite sure, but I believe they are either equal or lower.

Q. And how would those prices compare, for example,

*Deposition of Mr. A. E. Steepleton*

with the prices at which you sell to a service station or a dealer for resale?

99 A. Well, they are lower, because in every instance we have to recover our tax. We have bought this tire, we have got \$9.00, \$10.00 or \$15.00 excise tax in it, so in order to recover our excise tax, we have to report this sale with the tax exemption certificate, and we are paid a delivery commission again of seven and one-half percent of the state price.

Q. Is that seven and a half percent commission in addition to the price that you collect from the county or the particular governmental unit?

A. It is not in addition, because the state price is below our normal buying price, so every tire that we deliver to a state agency or governmental agency and we reclaim the Federal excise tax to be refunded, we have to show a stock movement number of a tire, similar tire that was purchased at our normal buying price, and then we are reimbursed by a credit or the difference between our normal buying price and the state price, plus a delivery commission.

Q. Yes, sir, and all of that difference is paid to you or credited to you by General Tire Company?

A. Correct.

Q. Now, with reference to these extra services that you provide for some few counties, Fayette County, Gibson County and Weakley County, what do they involve Mr. Steepleton?

A. Delivery of the merchandise some 50 or 75 miles  
100 or whatever the distance is involved, usually mounting the tires, and generally servicing like we would any other commercial account.

Q. Balancing, is that involved sometimes if it is a passenger tire?

A. Well, we wouldn't be in a position to balance tires

*Deposition of Mr. A. E. Steepleton*

away from here, because our balancing machine is lagged down to a concrete floor.

Q. Now, what I am trying to get at is do you in arriving at the price that you charge to particular counties for the products you sell them, do you take into account the state price list that you would charge any other county and add to that the cost of providing this extra service?

A. I would say that that is the way we arrive at it, yes.

Q. In substance then, you would be selling to them at a comparable price at which you would sell to another county, but adding the cost of providing the extra service?

A. The cost of providing that service, yes.

Q. Now, I don't think I have covered this specifically, but could you know how the price of passenger tires, new passenger tires, to United Taxi Company compares with the price of similar tires that you would charge a dealer or a used car dealer?

101 A. Well, I don't know exactly, but I think we are charging a little higher price. We are selling them a special taxi tire that is not available to my knowledge from other competitors, and we are able to collect a pretty good price.

Q. Is there a standard discount from the list price for these taxi tires that you normally apply 35 percent or three 10's, or something like that?

A. Well, I think we only have one account that we are selling these tires to.

Q. That is United Taxi?

A. That is United Taxi, and am not exactly sure what the discount is, but I think it is somewhere in the neighborhood of three 10's, 30 percent, or 33 $\frac{1}{3}$  percent off, somewhere in that category.

Q. How many commercial salesmen have you had in 1960 at any one time?

A. I think seven at the most during that period.

*Deposition of Mr. A. E. Steepleton*

Q. Now, is there another category of salesmen that you have working out in the field at the same time?

A. I have five men who will stay in the store part of the time, not all of the time, generally, and soliciting passenger tire business.

Q. They do occasionally go out to solicit business?

102 A. Oh, yes.

Q. What category or classification do you have for those, those salesmen?

A. What do you mean?

Q. You termed these other commercial salesmen because they are calling on your commercial accounts. Now, the five who specialize in selling passenger tires, do you have a name or classification for them?

A. We generally refer to them as passenger tire salesmen; however, they do in some instances—I mean they confine their activities mostly to soliciting passenger tire business. Now, they do get into some type of accounts which you would call a commercial account who may have ten cars and two trucks and would get some truck business, but their assignment is principally the solicitation of passenger tire business from all categories, and my passenger tire sales manager is the one that handles the taxi account that you refer to.

Q. Have these salesmen been termed retail salesmen?

A. It is possible to call them retail salesmen or passenger car salesmen. We call them all retail salesmen. (Off-the-record discussion.)

Mr. Tencher: I believe that is all the questions I have.

. . . . .



**TRANSCRIPT OF TESTIMONY AND PROCEEDINGS.**

4     The Court: All right, is the rule called for, gentlemen?

Mr. Burch: If Your Honor please, we would like the rule.

We have one witness that we would like to have at the counsel table. He is an attorney.

I believe Mr. Tinchier has a witness, Mr. Micklish, who is an attorney, and he wishes to stay at the counsel table. We have no objection at all. Mr. Micklish is an examiner and proposes to be here.

I would like to present to the Court at this time Mr. Ray Shaeffer and Mr. Walter deBruin, both attorneys. Mr. Shaeffer is with General Tire Company, Mr. deBruin with Goodyear Tire Company.

(Proceedings in re another matter.)

Mr. Tinchier: If I might comment just a moment, Your Honor, on Mr. Burch's calling for the rule. We have no objection, of course, to their keeping a representative of the company at the counsel table. And he correctly stated that we would like to have Mr. Micklish, the Wage-Hour investigator, at the counsel table.

In addition, the Government has three witnesses who we believe will be in position to give some expert testimony with reference to one of the issues in the case, and we would like those witnesses to be present and hear the testimony.

5     The Court: Well, is there objection to the expert witnesses remaining in the courtroom?

Mr. Burch: Yes, Your Honor. I would like to know just a little bit about who they are, what they are going to talk about, before I can tell Mr. Tinchier more about it.

Mr. Tinchier: We have Dr. John R. Moore, of the University of Tennessee Department of Economics, Dr.



*Testimony of A. E. Steepleton*

Robert C. Brooks from Vanderbilt University Department of Economics, and Miss Sarah Ginsberg, who is an economist with the Wage-Hour Division in Washington.

Mr. Burch: I have no objection to any of those, Your Honor.

. . . . .

7

**PLAINTIFF'S PROOF.**

Thereupon the Plaintiff, in support of the allegations of the complaint, introduced evidence, as follows:

**A. E. STEEPLETON,**

the first witness, having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tinchler:

Q. Will you state your name, please, sir?

A. A. E. Steepleton.

8 Q. And what is your relation, Mr. Steepleton, to the defendant, Steepleton General Tire Company, Inc.

A. I am President.

Q. Do you own the stock of that company?

A. I own about ninety-five percent of it.

Q. All right, sir. Where is the business located, Mr. Steepleton?

A. 246 Monroe in Memphis.

Q. You have two buildings that are operated there by the business?

A. Yes, there is one main building that we conduct most of our business in, and then there is one across the street which is principally a warehouse.

Q. Yes, sir. What is the relationship of your company to General Tire and Rubber Company?

*Testimony of A. E. Steepleton*

A. We are one of their dealers, independent dealers.

Q. And what territory does your company serve?

A. We serve principally—most of our business is in Shelby County, but we do some business in the adjacent area, probably a seventy-five mile area or radius of the city.

Q. That includes some counties in Mississippi and Arkansas?

A. Yes, sir.

. . . . .

16 Q. And is it true that your service trucks with  
their drivers make calls outside of Tennessee to  
repair tires and to remove tires and to put tires on  
17 your customers' equipment?

A. That is true. But may I add this, that there is a substantial portion of the merchandise billed to the out-of-state customers that comes into our place and we fix it up there and we apply the tires on his car, or he drives a pick-up truck in and picks them up and takes them back to Arkansas himself.

Q. But in the normal course of business, your employees do vulcanize, re-cap or repair tires which necessarily are delivered to points outside Tennessee?

A. Yes, sir.

Q. In addition to that, Mr. Steepleton, do your service men go into the terminals of various trucking companies and contractors and work on their equipment to remove tires, to repair flats, and to install recapped tires?

A. Yes, sir.

Q. And many of those customers are operating their vehicles across state lines into other states than Tennessee, are they not?

A. I am sure that some of them are.

Q. In fact, would not that be a very considerable part of their business?

*Testimony of A. E. Steepleton*

A. Some of them, yes.

18 Q. Yes, such as Southwestern Transportation or  
Gordon Transport and the Kroger Company, customers of that kind?

A. I have no idea how much of their business is interstate. Some of them is.

. . . . .

19 The Court: We are confining this investigation to the single year 1960. It seems to me there was some stipulation along the way somewhere that that would be the case.

Mr. Tincher: That is correct, your Honor, with reference to the coverage issue and the exemption issue.

The Court: As being typical of this defendant's operation?

Mr. Tincher: Yes, sir.

The Court: All right.

. . . . .

20 Q. In 1960, where did you place your order for tires that you obtained from General Tire & Rubber Company?

A. With their division office on Huron Street.

Q. Here in the City of Memphis?

A. Yes, sir.

Q. And from where did you receive delivery of merchandise you got from General Tire?

A. From their warehouse.

Q. Would that be all of it or part?

A. Occasionally when they were out of an item, or had to be back ordered, the item would be shipped from some other warehouse.

Q. And that did occur from time to time in 1960?

A. I am sure it did. I don't receive the merchandise. I don't know where it comes from, now.

*Testimony of A. E. Steepleton*

Q. But anyway, you are aware that some of it is received from out-of-state shipments?

A. I am sure it is, some small portion of it.

\* \* \* \* \*

21

**Cross-Examination,**

By Mr. Burch:

Q. Mr. Steepleton, how long have you been in the tire business?

A. Since 1938; twenty-four years.

Q. Is it or not a fairly competitive business?

22 A. I did not understand.

Q. Is it or not a fairly competitive business?

A. It is extremely so.

Q. In order to stay in it, do you have to equip yourself with some knowledge as to how it is conducted and run, and what its practices are?

A. Yes, I imagine so, you certainly——

Q. Let's don't imagine. I want you to be sure about it.

A. I believe you would have to grow up in it, because I don't believe a beginner today could exist in it, it is so highly competitive.

Q. Has it gotten more competitive since the war than it was before?

A. Tremendously so in the last four years.

Q. Now, before I ask you about the general practices with which you are familiar from these long years of experience, I want to ask you a little bit about your individual business.

Now, you have been questioned about sales that have been made to out-of-state customers, and undeniably you do make such sales, do you not?

A. Right.

Q. Now, will you state, would billings to out-of-state

*Testimony of A. E. Steepleton*

customers be directly indicative of the volume of  
23 sales to out-of-state customers, or not?

A. The billing?

Q. The billing, yes.

A. Well, I don't know of any other way you could  
determine——

Q. Well, you gave Mr. Tinchler that answer, and since  
I think it is wrong, I want to ask you about it.

Say I am a planter at Horn Lake, Mississippi, and  
I actually come in there and buy four tires in your place  
of business, and you install them on my automobile, and  
the billing goes to me at the Horn Lake business, but  
where was the sale or delivery made?

A. I understand what you are getting at, now, Mr.  
Burch. The point I brought up a while ago, the sale and  
the delivery quite often is made at our place of business  
in the State of Tennessee.

Q. Well, from——

A. (Continuing) And——

Q. From your general——

A. (Continuing) The billing, of course, shows up as  
to an out-of-state customer.

Q. Exactly. From your general knowledge of your  
business, of whatever the volume in sales develops to be  
that is billed to customers outside of the state, what  
24 approximate percentage of those billings which  
refer to transactions where the actual sale and  
delivery was made within the state and goods delivered  
or installed at your place of business?

A. Of course, I have no way of knowing. I don't review  
the invoices every day, and I don't know whether the  
man came after the merchandise or whether he didn't.  
But it is possible that our sales tax records might reflect  
that differential.

Q. Just give us your best estimate, subject to correc-

*Testimony of A. E. Steepleton*

tion, if we can correct it by the records, which I rather doubt can be done. But would you say a fourth, a third, or a half, anyway to guess, in accordance with your best judgment on it?

. . . . .

25 In your best estimate, what percentage would reflect the installation to—delivery locally here where the billing is outside the state? Just give us that the best of your knowledge.

A. Mr. Burch, it would have to be strictly a guess, but I know it is lots of it, and could be at least twenty-five or thirty or thirty-five percent of it, but—

Q. Now, you were asked about the recapping. Do you sell many recaps?

A. We sell very few. Practically all of our business is consumers—customer recaps.

Q. Actually, the recapping business is a business  
26 of furnishing service rather than of sales, is it not?

A. Correct.

Q. So that the Court will understand it, just give us an example of a typical recapping transaction.

A. Well, recapping transaction is that we find a prospect who has smooth tires on his vehicle—automobile, truck, earthmoving machine, whatever it may be—and we solicit his business to recap his tires, and we return the same tires that are removed.

Q. So he brings in his tires and he gets back his tires?

A. Right.

Q. And what you have furnished him is the service of recapping?

A. Yes, sir.

Q. Now, you do occasionally sell a recap, do you not?

A. We occasionally sell a recap.

Q. Approximately what volume of the recapping business is involved in such sales of recaps as distinguished from furnishing recapping service?

*Testimony of A. E. Steepleton*

A. Well, I doubt if it is over five or ten percent.

Q. Now, that is in the general business, but what of the recapping business?

A. What is that?

Q. Five or ten percent has reference to—?

27 A. Five or ten percent of the recapping business, yes.

Q. Now—

A. (Continuing) And again, that is a guess. But it is very infinitesimal.

Q. It is not a substantial factor in your business, is it?

A. No.

Q. Now, where are these retreading services performed with reference to the physical layout of your plant?

A. We have an area of our building of about fifty percent of it that is devoted to the recapping of tires and repairing.

Q. Well, is that all done under one roof?

A. Yes, sir.

Q. And that is all in Memphis, Shelby County, Tennessee?

A. Yes.

Q. And now, Mr. Steepleton, during the year 1960, did your sales—your annual gross sales of goods and services of all tires aggregate as much as one million dollars?

A. No, sir.

Q. Have you ever sold in the aggregate of goods and services as much as one million dollars?

A. No, sir.

28 Q. During the year 1960, state whether or not more than fifty percent of your annual dollar volume of sales was made within the State of Tennessee?

A. Yes, it was more than fifty percent.

. . . . .

*Testimony of A. E. Steepleton*

31 Q. Mr. Steepleton, state whether or not more than fifty percent of your annual dollar volume of sales is made within the State of Tennessee, and was so during the year 1960.

32 Mr. Ray: Conclusion.

A. They are, yes, sir.

Q. And were they during the year 1960?

A. Yes, sir.

Q. State whether or not more than seventy-five percent of your annual dollar volume of sales consisted of sales which were not for resale during the year 1960.

A. Yes, they were more than seventy-five percent.

Mr. Ray: A conclusion.

Q. More than seventy-five percent were for sales of goods that were not for resale but for ultimate consumers during the year?

A. Yes, sir.

. . . . .

34 By Mr. Burch:

Q. Now, Mr. Steepleton, you know the meaning of the word "resale", don't you?

A. Yes, sir.

Q. And does the word "resale" mean to you that when a person buys something that they then sell it to another customer, it was resale—?

A. That is my understanding of it. And that is considered a wholesale sale within the industry.

Q. Now, do you know what the words "ultimate consumer" mean?

A. The ultimate consumer is the man that uses the commodity.

Q. If a man buys tractor tires and puts them on his own tractor and uses them up plowing his cotton, is he the ultimate consumer?

A. He is the consumer.



*Testimony of A. E. Steepleton*

35 Q. If Kroger Company buys truck tires for their fleet and puts them on their trucks and uses them up on the highway, are they the ultimate consumer?

A. They are the ultimate consumer.

Q. If Joe Doakes Tire Company buys tires and puts them in the inventory and exposes them to the market for sale, is that for resale as you are using the terms?

A. That is my understanding.

Q. All right. Now, I want to ask you this, as a matter of fact.

State whether or not more than seventy-five percent of your annual dollar volume sales consisted of sales which were to the ultimate consumers and not for resale during the year 1960.

. . . . .

36 Q. During the year 1960, Mr. Steepleton, were more than seventy-five percent of your annual dollar volume of sales made to ultimate consumers and not to resellers?

A. They were.

Q. Now, you have previously answered me about the sale of retread tires. They are known in your business as stock recap, are they not?

A. Yes.

Q. State whether or not during the year 1960 that more than eighty-five percent of the stock recaps were sold in the State of Tennessee.

A. State that again, Mr. Burch. I did not quite understand it.

Q. These are technical questions, and I want to ask them to you right and be sure that you understand.

That more than eighty-five percent of your retreaded tires which were sold during the year 1960 were  
37 sold in the State of Tennessee.

*Testimony of A. E. Steepleton*

A. They were.

Q. Now, during the year 1960, was as much as fifty percent of the annual dollar volume of your income from sales and services made up of sales of stock recaps?

A. A very small percent of it.

Q. I asked you if it was as much as fifty percent, Mr. Steepleton.

A. No, sir.

Q. It was less than fifty percent.

A. Yes, sir.

Q. Now, I want to ask you, from your long experience in the tire business, I want to ask you in the language used by the statute, in the particular industry of which you are a part, is a sale to an ultimate consumer and which is not for resale recognized as a retail sale in that particular industry?

. . . . .

41 By Mr. Burch:

Q. Mr. Steepleton, based upon the years of experience about which you have testified, state whether or not in the tire industry a sale to an ultimate consumer is considered in that industry as a retail or wholesale sale.

A. I started in the tire business in '38 as an employee of another retail independent tire dealer. Subsequently, I went to work for the General Tire & Rubber Company as one of their territory salesmen. And then I became later a store manager for a company owned store, and since that time was able to purchase the stock in that company and acquire it as my own business.

Always, with every type or phase of the industry that I have had anything to do with, the sales to the ultimate consumer has always been recognized as a retail sale.

Q. Now, would not that—

A. (Continuing) And the only other division or classi-

*Testimony of Arnold E. Hirsch*

42        fication in sales in this industry is a sale to another  
         dealer for resale.

         Q. And that is classified as what?

         A. As wholesale.

         . . . . .

44

**ARNOLD E. HIRSCH,**

having been first duly sworn, testified as follows:

         . . . . .

48

**Cross-Examination,**

By Mr. Burch:

         Q. Mr. Hirsch, your place of business where your  
garage is—the checks and mounting of tires—is located  
where?

         A. At 2330 Frisco here in Memphis.

         Q. State whether or not any tires that you might have  
purchased from Steepleton in 1960 and any recaps that  
you had recapped by Steepleton that year were delivered  
to you at those premises.

         A. It is my understanding that they were delivered  
there. I know they were delivered to that address, sir.

         Q. As far as you know, every delivery, either a new  
tire or recap, that was made by Steepleton in 1960 was  
made at Memphis, Shelby County, certainly, either at  
his place or your place; you could be sure about that,  
would you?

49        A. I think that is correct.

         Q. Now, you have stated your company buys some  
tires—or bought some tires in 1960 from other people than  
Steepleton; that is correct, isn't it?

         A. Yes, sir.

         Q. State whether or not the tire business, like the  
grocery business, is a highly competitive business.

*Testimony of Arnold E. Hirsch*

A. Well, I suppose it would be. There is quite a few people trying to sell tires.

Q. You are going where you can get the best price and the best service, aren't you?

A. Yes, sir.

Q. There is no reason why you would buy the General tire at a certain price if you could get a Firestone tire for fifty cents cheaper?

A. If we could.

Q. Not going to argue about which is the best tire?

A. That is right.

Q. But, assume that all the major brands are the same, generally, comparable in price, service has a good deal to do with where you give the business, hasn't it?

A. That is right.

Q. And the tire prices have fluctuated and continually have changed—you have bought tires at other  
50 places, you have testified?

A. Yes, sir.

Q. Now, when you deliver a tire for recapping to Steepleton, do you get back recapped the same carcass that you delivered?

A. Yes, I think we do.

Q. Now, does a truck always choose a forty hour week to break down in, or do they sometimes break down at night, holidays, Sundays, or weekends?

A. Yes, sir.

Q. And when they break down, whether it has been in a forty hour week or the middle of the night, they expect somebody to give them service.

A. Our garage man tries to call someone to perform that service for him, yes, sir.

Q. Does Steepleton then have service available on weekends or holidays?

A. I think my garage man said that he did, yes, sir.

*Testimony of Howard Croom*

Q. To the extent of your knowledge, he does, doesn't he?

A. Yes, sir.

. . . . .

51

**HOWARD CROOM,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tinchler:

. . . . .

54 Q. When recapped tires are delivered to Southwestern Transportation Company, do you know whether they are tires which belong to that company and which have been recapped at the Steepleton Tire Company recapping plant?

A. As far as I know, they all belong to Southwestern.

Q. Is it the practice for Steepleton Tire Company to put a tag or a label on the particular tire so that you can return the same tire to Southwestern that you have removed from their equipment?

A. Yes, sir, they are all tagged.

Q. In other words, that would be customer recapping done by Steepleton on Southwestern's own tires?

A. Correct.

Mr. Tinchler: You may have the witness.

**Cross-Examination,**

By Mr. Burch:

Q. Mr. Croom, where is the Southwestern Transportation Company located?

A. I don't know the exact address of them.

Q. Is it in Memphis and Shelby County, Tennessee?

A. Yes, sir.

55 Q. And that is where those deliveries are made and where this work of supplying recaps goes on?

A. That is right, at their terminal.

*Testimony of Howard Croom*

Q. Now, you haven't got anything to do with sales, have you?

A. No, sir, I do not.

Q. But you do supervise deliveries and you do know in general the customers who receive these deliveries from the trucks that are under your supervision, do you not?

A. Yes, sir.

Q. Do you know generally who they are?

A. Generally, not all of them.

Q. State whether for the most part they are users who use tires and who do not resell tires.

A. They are users of tires.

Mr. Burch: That is all.

Just a moment.

Q. With reference to your trucks, you have got three routes of what you call country trucks, haven't you?

A. Yes, sir.

Q. And one of them goes north here in Tennessee. That is its general run, isn't it?

A. Yes, sir, that is what I say.

Q. And you stated that the others went out of the State four days a week. Do you mean go out of the State or go out of Shelby County four days a week?

56 A. They go out of Shelby County.

Q. That is what I wanted to clarify. About how many days a week do you have a country truck going into some other state than Tennessee?

A. Some other state—we go to Mississippi on Tuesday and Arkansas on Thursday.

Q. And what points—?

That is two days a week you go out of the State of Tennessee, isn't it?

A. That is right.

Q. And who are the principal customers in Mississippi

*Testimony of Howard Croom*

and who are the principal customers to which deliveries are made?

A. I am not familiar with the customers out from this perimeter of Memphis here, the general vicinity.

Q. I see. So the country trucks go out two days a week, one truck goes to Arkansas, one truck goes to Mississippi, the rest are just used in the County?

A. Yes, sir.

Mr. Burch: That is all.

. . . . .

59

**Recross-Examination,**

By Mr. Burch:

Q. Mr. Croom, this truck that goes one trip into Arkansas a week and one trip into Mississippi a week, is it a big over the road transport trailer or is it a service truck?

A. It is a service truck. It is a little larger than the usual run we have.

Q. And in addition to whatever tires and retreads it carries on that, they are equipped with tubes, they carry a compressor and tire tools, things of that sort, I think?

A. It does.

60 Q. Now, you are with the Service Department, aren't you?

A. Yes, sir, that is correct.

Q. Do you give service on weekends?

A. Only emergency service.

Q. If one of your customers breaks down at one or two o'clock on Sunday night, can he get service with Steepleton?

A. Yes, sir, if he will call either the service man or myself, and we will make arrangements to help him that night.

Q. And is that true on a holiday?

*Testimony of James H. Micklish*

A. That is true nights, holidays, any day.

Q. Anybody that is one of the customers of your company, when he has got to have service, he gets it?

A. If he has got to have it, he will get it.

Q. And that doesn't matter about forty or fifty hours, Christmas, holidays, day or night, he gets it?

A. Yes, that is right.

\* \* \* \* \*

61

**JAMES H. MICKLISH,**

the next witness, having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tincher:

Q. Would you state your name, please, sir.

A. James H. Micklish.

Q. By whom are you employed, Mr. Micklish?

A. The United States Department of Labor.

Q. In what capacity?

A. As a Wage-Hour investigator.

Q. And in that capacity, did you make an investigation of the Steepleton General Tire Company right here in the City of Memphis?

A. Yes, sir, I did.

Q. When was that investigation made, Mr. Micklish?

A. In May of 1961.

Q. Would you describe briefly what your investigation consisted of at that time?

A. Consisted of conferences with management, inspecting and transcribing records, and interviewing employees and former employees.

Q. Did you make any observation of the establishment, the work that was being done there?

A. Yes, sir, during the investigative period I of course observed the work of employees of the company.

62



*Testimony of James H. Micklish*

Q. Since May of 1961, have you done any further investigative work at Steepleton Tire Company place of business?

A. Yes, sir.

Q. When was that, and briefly what did it consist of?

A. Sir?

Q. I say when did you do it, briefly what did it consist of?

A. Well, a part in January and part in February of 1962, I transcribed—I checked and transcribed the invoice records of Steepleton General Tire Company. And in the latter part of February and early part of March, the first couple of days in March, '62, I again entered the establishment to review and transcribe accounts receivable, records, among other things.

Q. All right. And from the accounts receivable records, did you prepare any transcription relating to customers of Steepleton Tire Company who are located outside the State of Tennessee?

A. Yes, sir.

Q. I hand you here some yellow sheets in a folder and ask you to tell us what those sheets consisted of.

A. That is the transcription from Steepleton General Tire Company accounts receivable records of sales  
63 made to customers outside the State of Tennessee.

Q. In what year?

A. In the year 1960.

Mr. Tincher: If the Court please, counsel for defendants has been furnished copies of these transcription sheets in a slightly different arrangement than we have here, and in discussion with Mr. Mitchell, we have agreed that after they have been put in evidence that we will help them to arrange their sheets—their copies in the same order.

So with that explanation, I wish to offer the transcription sheets which have been identified by the witness as Plaintiff's Exhibit number 1 in the case.

*Testimony of James H. Micklish*

(Thereupon, said folder of sheets was accordingly marked as Plaintiff's Exhibit 1, and same will be found among the exhibits in the cause.)

\* \* \* \* \*

Q. Do these transcription sheets, Mr. Micklish, which have been made Exhibit 1, reflect dollar volume of sales to these out-of-state customers as shown by the defendant's records?

A. Yes, sir, so far as I could pick them up. Of course, the possibility exists that I overlooked some of  
64 them. But they do reflect substantially the total dollar volume.

Q. All right. Do you have the total dollar volume figure of sales to out-of-state customers as reflected by these transcription sheets here which have been made Exhibit 1?

A. Yes, sir.

Q. What is that amount?

A. \$86,850.59.

The Court: What does that figure refer to, now? Total volume of out-of-state sales?

Mr. Tinch: Yes, sir, the sales to out-of-state customers in '60.

Mr. Burch: I don't think it is going to make any difference, but is that tendered to the Court as sales to out-of-state customers or billings to out-of-state customers.

Mr. Tinch: I am not sure that we are in position to differentiate, if there is any distinction, because they are taken from the defendant's own records.

Mr. Burch: Well, they are then the records of the defendant which show billings done to out-of-state customers, is all they show?

Mr. Tinch: Yes.

Mr. Burch: That is all I want to know.

*Testimony of James H. Micklish*

Mr. Tincher: Taken from the accounts receivable ledger.

. . . . .

67 Q. Did you in the course of your examination examine the defendant company's records that reflected sales of merchandise and sales of recapping services for resale?

A. Yes, sir.

Q. Would you look at the sheets which I am handing you now and tell us what is shown on those sheets, and where you got the information?

A. The first sheet consists of monthly totals taken from what the company calls their analysis of receivables.

The second sheet indicates sales to the International Harvester Company.

Q. From what particular ledger, if it was identified as such, are these monthly totals which you have designated dealer sales—which ledger does that come from?

A. From ledger number two of the analysis of receivables.

. . . . .

68 Q. Did Mr. Steepleton or did Mrs. Landerdale tell you that they were all dealer sales as shown by ledger number 2?

A. Yes, sir, they were sales to dealers at dealers' discounts.

Q. And for purposes of resale?

A. Well, she indicated that some of them were thereafter—she certainly couldn't follow each sale along to know exactly what ordered, where ordered, but in examining the records, they were substantially all sales to other tire companies or to service stations or used car lots and the like.

Q. And what was the total figure as reflected by defendant's ledger number two, first to dealers, in the year 1960?

*Testimony of James H. Micklish*

A. \$54,276.01.

Q. Now, you have identified the second sheet in this folder as reflecting sales to International Harvester Company.

What was the nature of sales to International Harvester Company?

69 A. Those were sales of new tires and recapping to be placed on merchandise which International Harvester Company had taken in trade, and to be sold to the general public.

Q. What was the dollar value of those sales, Mr. Micklish?

A. \$4,119.01.

Q. The total, then, from the two groups of sales for the year 1960 was how much?

A. \$58,395.02.

Mr. Burch: Give me the sum again there. Fifty-eight thousand what?

A. \$395.02.

Mr. Burch: Thank you.

Q. Are you in position to say whether that total represents all the sales by Steepleton Tire Company in 1960, which were sales for resale?

A. No, sir.

Mr. Tincher: I wish to offer as Plaintiff's Exhibit number 2 the sheets which the witness has finished testifying to.

(Thereupon, said documents were accordingly marked as Plaintiff's Exhibit 2, and same will be found among the exhibits in cause.)

Q. Mr. Micklish, did you examine the accounts receivable ledger records of Steepleton General Tire  
70 Company reflecting transactions by which Steepleton transferred tires or other merchandise to General Tire and Rubber Company?

*Testimony of James H. Micklish*

A. Yes, sir, I did. Under the accounts receivable ledger of General Tire and Rubber Company there were such transactions.

Q. I will hand you here a folder of transcription sheets and ask you to describe what information you have there, and what it relates to, whether it came from Steepleton's records.

A. Yes, sir, they came from Steepleton's accounts receivable records headed General Tire and Rubber Company, and they indicate national account sales.

Q. Now, would you explain what is national account sales, what that term means?

A. National account sales is a sale to a customer, the billing of which is handled between the home office of the tire company involved and the home office of the customer involved.

Q. Could you give an example of how that account—a national account sale is made or how it is handled by Steepleton General Tire Company?

A. Steepleton General Tire will, upon request from the customer, make delivery—request from the  
71 national account customers—make deliveries of the number of tires or type tires need. They in turn will bill General Tire & Rubber Company for this merchandise.

And it is my understanding that General Tire & Rubber Company in turn bills the company involved.

Q. In that transaction, would the invoices which you examined reflect the price of the tires that were delivered by Steepleton and any commission that was charged for the handling of the transaction?

A. Yes, sir. And in addition to the national accounts transaction in this exhibit which I have explained, there are also samples of invoices to the General Tire & Rubber Company indicating the price or the cost of the tire, plus

*Testimony of James H. Micklish*

national account commissions, or plus commissions and less certain other allowances.

Q. I notice a sheet here which has a number thirteen on it and which appears to be copied from a sales invoice.

And it bears the number 66320, and an entry: "Sold to General Tire & Rubber Company, date 11-12-60."

Does that relate to what you have described as national account transaction?

A. Yes, sir. For each national account transaction there is an invoice made out in that manner, "Sold to General Tire & Rubber Company," and you may want the invoice on it.

72 Q. And that invoice is sent to the General Tire & Rubber Company to indicate a charge which Steepleton Tire Company is making for handling the transaction?

A. Yes, sir.

Q. I notice sheet number 14, bearing number 65360, also appears to be copied from the invoice which says, "Sold to Tri-State Mack Distributor," dated 10-20-60 and bearing other information.

Does that copy relate to the same transaction that you have just described where the notation was made, "Sold to General Tire Company"?

A. Yes, sir.

Mr. Burch: Before you get beyond that, where is the entry to General?

Mr. Tincher: These two there.

(Counsel confer)

Q. I call your attention to the fact that on sheet number 14 a note—amount of dollars and cents, size, relative to the same has been recorded for this on sheet number 13, the invoice billing General Tire & Rubber Company for the same tires.

There is an amount totaled for the merchandise and

*Testimony of James H. Micklish*

other information, totals for percentage, which I understand is the commission; is that correct?

A. Yes, sir.

73 Q. And did you say that these two sheets which you copied from invoices are representative of the national account transactions that you observed in Steepleton's records.

A. Yes, sir.

Mr. Tincher: I wish to offer as Plaintiff's Exhibit number 3 the transcription sheets relating to the national account transactions, as described by the witness.

(Thereupon, said documents were accordingly marked as Plaintiff's Exhibit 3, and same will be found among the exhibits in the cause.)

Q. Mr. Micklish, do you have totals showing the dollar volume for the year 1960 of those national account transactions as reflected by Exhibit number 3?

A. Yes, sir.

Q. And what is the total for the year?

A. \$115,597.62.

Q. Can you tell me where you got that total, Mr. Micklish?

A. Yes, sir. From the accounts—from the accounts receivable records of General Tire & Rubber Company. Each individual transaction was listed, and there was a monthly total. This figure was derived from adding up the monthly totals for 1960.

74 Q. Does that figure coincide with your own totals of day to day individual transactions which are listed?

A. No, sir. There is approximately three thousand dollars difference. The monthly totals are greater than the individual totals.

Q. But, in any event, are those monthly totals the totals that were entered on the ledger by Steepleton Tire Company?

*Testimony of James H. Micklish*

A. Yes, sir, as monthly totals.

Q. Now, Mr. Micklish, did you examine Steepleton Tire Company's accounts receivable ledger with reference to fleet customers who operated ten or more vehicles in 1960?

A. Yes, sir.

Q. Were those—to clarify that just a little bit—commercial vehicles operated in 1960 by these customers?

A. Yes, sir.

. . . . .

75 Q. Mr. Micklish, will you state whether or not in your course of the investigation and preparation of this case ascertains whether these customers that you have identified did operate ten or more commercial vehicles in 1960?

A. Well, during my initial investigation, you know, I picked up those which I felt would operate ten or more commercial vehicles.

During some later work, I received knowledge from one source or another that the customers contained in this exhibit did operate in 1960 ten or more commercial vehicles.

Q. Then, is it a fact that you do have knowledge with reference to each of the fleet accounts you have included that—in 1960 that operated ten or more commercial vehicles?

A. Yes, sir, with possibly one or two exceptions. And those exceptions will be based on information that was obtained—well, from Steepleton salesmen, for instance.

76 Q. In the depositions which the salesmen gave?

A. Yes, sir.

. . . . .

Mr. Tincher: I will offer for identification purposes the folder which on its cover bears the caption "Fleet Accounts and P. & L. Statement," and other  
77 descriptive terminology, as Plaintiff's Exhibit number 4.



*Testimony of James H. Micklish*

Mr. Mitchell: For identification.

Mr. Tincher: For identification.

(Thereupon, said documents were accordingly marked as Plaintiff's Exhibit 4, for identification, and same will be found among the exhibits in the cause.)

. . . . .

106                    **Direct Examination (Further),**

By Mr. Tincher:

Q. Mr. Micklish, have you in the course of your examination of defendant company's sales records made any transcriptions that related to sales of recapping exclusively, or recapping work?

A. Yes, sir, I did. From the sales invoices, I made transcription of recapping work to certain customers.

Q. I will show you here a folder with transcription sheets, some of which have been labeled Kroger, and others Southwestern, and ask you whether those transcription sheets relate only to recapping by Steepleton Tire Company?

A. Yes, sir.

. . . . .

107    Q. Did Mrs. Lauderdale make a statement to you with reference to the price at which recapping was done for the customers that you have listed here in this group of transcriptions?

A. No, sir, I don't believe it was Mrs. Lauderdale. I believe it was Mr. Steepleton.

Mr. Tincher: All right.

A. (Continuing) —Who indicated—who told me that sales of recapping to certain customers were at less than what they called their customers list prices, less than the printed price.

Q. When did Mr. Steepleton give you that information?

A. This was during the initial investigation.

*Testimony of James H. Micklish*

Q. In May of 1961?

A. Yes, sir.

Q. Did he identify any of those customers for whom the recapping was done at less than this commercial rate?

A. Yes, sir, he named Wilson and Company,  
108 Kroger, Continental Baking.

Q. Stewart's?

A. And possibly Stewart's. Yes, Stewart's, Incorporated; possibly a couple of others, but those are the ones I recall definitely.

Q. Do these transcription sheets relate to those customers, among others?

A. Yes, sir, those and others.

Q. Now, with reference to that price for recapping, did you examine sales invoices to determine whether other customers were getting such discounts or lowered prices for the recaps?

A. Yes, sir.

Q. And in this group of transcriptions, have you included only those which you found were getting their recapping done at less than the usual commercial rate?

A. Yes, sir, at less than the commercial list price for any of those tires, which were receiving this discount here.

There are several types of tires on which they did not receive that discount, but they did on some of the others.

Q. If I understand it correctly, then you have included in this group of transcriptions the sales recapings to a limited number of Mr. Steepleton's customers who on the particular tire that you have included in this list were given less than the commercial rate?

109 A. Yes, sir.

Q. If any of these particular customers had recapping done at any time for the same rate as the ordinary run of customers, did you or not leave out the transcription relating to such recapping?

*Testimony of James H. Micklish*

A. Well, the transcription would be in there, but I did not include it in the totaling those sales. The transcription itself would be in there, if that occurred.

Q. Yes, sir. The totals which you have made, then, relate only to the sales of recapping at less than the regular commercial rate?

A. Yes, sir.

Mr. Tincher: I wish to offer this group of transcriptions as Plaintiff's Exhibit number 5.

Mr. Mitchell: Let's see it before it goes in.

A. (Continuing) Sir, also included in there——

Mr. Tincher: The witness has a little explanation, I believe.

A. (Continuing) ——also included in that are the transcriptions which I took from the invoice records showing sales to customers other than those customers, for comparison purposes. They appear in the back.

Mr. Mitchell: Where do they start, Mr. Micklish?

110 A. They are on the back there.

Q. If I understand it correctly, then, the sheets at the back of that folder which start with page number two relate only to your sales comparison and not to the amount from which you have derived the total, is that correct?

A. Yes.

Mr. Tincher: Plaintiff's number 5.

(Thereupon said documents were accordingly marked as Plaintiff's Exhibit 5, and same will be found among the exhibits in the cause.)

Mr. Tincher: I wish to offer this in evidence at this time, Your Honor.

Q. Now, Mr. Micklish, did you arrive at a total figure in dollars and cents for the type of sales which you have described, and which total will be taken from Plaintiff's Exhibit number 5?

A. Yes, sir.

*Testimony of James H. Micklish*

Q. What is that total, please?

A. \$24,951.00.

Q. Mr. Micklish, I hand you here a printed folder which is headed "Interpretative Bulletin, Title 29, Part 779," and ask you to tell the Court what that is, if you will.

A. This is a Department of Labor publication, Interpretative Bulletin, which established—this is the  
111 criteria for retail type establishments, and it is the bulletin which I used in determining or in applying these totals to determine whether or not Mr. Steepleton's operation was a retail establishment.

Q. Will you look at the last page of the bulletin and tell us from that the date of the issue of this particular bulletin?

A. January 1960.

Q. Was this the bulletin that was being used by you at the time you made your investigation in May of 1961?

A. Yes, sir. There may have been some—I don't know—some new printings come out on it but this is the same bulletin.

Q. Will you turn to that portion of the bulletin which applies to the automotive tire industry?

A. It is on page 32, section—no, it is on page 33, section 779.37.

Mr. Burch: Now, if Your Honor please, just to show Mr. Tinchler and Mr. Ray that I am really a pleasant individual, this is not authenticated properly, this is not in proper form to go in evidence, but I make no objection to it.

I do make objection to the substance of it as being contrary to the statutes of the United States.

112 I merely wish to record the objection, Your Honor, and will say more later on.

The Court: All right, sir.

*Testimony of James H. Micklish*

Mr. Tincher: With that observation from counsel, I will offer the bulletin described by the witness in evidence as Plaintiff's Exhibit 6.

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 6, and same will be found among the exhibits in the cause.)

. . . . .

113

**Cross-Examination,**

By Mr. Mitchell:

. . . . .

115 Q. Now, then, Mr. Micklish, in your Exhibit 1 in evidence here at the trial, you have accumulated under the heading "Out-of-state Sales" a number of sheets of paper which reflect—which you took off of the invoices at Steepleton's place of business, and you come up with a total I believe of \$86,850.59.

116 A. Yes, sir, but they were not taken off of invoices. They were taken off of accounts receivable.

Q. But from the records?

A. Yes, sir.

Q. And, if I understood your testimony a moment ago, that it does not include—that is, this Exhibit 1 to your testimony here today does not include new or different things in addition to what you had at the time we took your deposition for the last time in this case, in terms of the out-of-state sales records.

A. No, sir, it includes nothing new.

Q. Now, then, actually the term "out-of-state sales," as used by you, according to what you maintain is a synonym, namely, sales in direct commerce, is it not?

A. Sales in commerce, yes, sir.

Q. But do you not use sales in direct commerce to include sales to persons whose billing addresses, what not, may be out the State of Tennessee, and also include

*Testimony of James H. Micklish*

such things as sales to manufacturers or sales to persons who perhaps operate themselves in interstate commerce?

Isn't that then generally what Labor Department employees mean when they say sales in direct commerce?

Mr. Micklish, there is no occasion to be thoughtful. I am doing my best to paraphrase the definition you  
117 gave me at the time of taking your deposition. If my paraphrase is inaccurate, tell me. If not, tell me, and we will go ahead.

A. It is substantially correct, sir.

Q. Is that what you have included in this term "out-of-state sales," Plaintiff's Exhibit 1?

A. Yes, sir.

Q. All right, you say it is based on the same information you had at the time I took your deposition?

A. Yes, sir.

Q. At the time I took your deposition, your total for this same figure, "Now, what is the total according to your tape of all such sales in direct commerce?"

This is by you: "\$85,429.67."

Mr. Mitchell: Mr. Tineher, I am referring to page 49 of the second phase of Mr. Micklish's deposition.

Q. (Continuing) I want to know what is the difference between that figure, if it were done by adding machine tape, and the figure you have just come up with there, \$86,850.00, if they are not based on different sub-totals or sub-categories?

A. What is the figure?

Q. \$85,429.67.

A. I can't account for it, sir, unless there was an error in arithmetic. I can't recall that I included any  
118 thing I had previously included.

Q. Well, that is your testimony?

A. Yes, sir.

Q. That this Exhibit 1 is based on what we have been talking to between ourselves about before.

*Testimony of James H. Micklish*

A. Yes, sir.

Q. Actually, at the time you first audited, before this lawsuit was filed, did you come up with a figure at that time for out-of-state sales, any precise total.

A. No, sir.

Q. And Exhibit 1 plainly includes all sales made to customers who have billing addresses out of the State of Tennessee, is that not correct?

A. Yes, sir, although with possibly one or two exceptions, which I believe you will find on the inside.

Q. Well, you filed the exceptions, sir?

A. Yes, sir. Joe Simpkins Leasing Company, St. Louis, Missouri, was one that I excluded.

Q. On what basis, Mr. Micklish?

A. Well, it was my understanding that the company did not operate outside of up in Missouri, and I wasn't quite sure how that way—a way like that would come about, so I excluded it. I believe that another is  
119 Ramon Rine at Osceola, Arkansas, is a one shot dealer, one or two shots.

Q. But for the rest of the Exhibit 1 exhibits sales to customers, you had out-of-state billing addresses?

A. Yes, sir.

Q. And you did not even attempt—I believe I am correct—if not, tell me where I am wrong—you made no attempt to determine whether or not the sales were actually made—the deliveries made to any or all of these companies right here at the Steepleton Company on Monroe Avenue in Memphis, Tennessee?

A. That is right.

Q. To the extent that there are included in your Exhibit 1 invoices or accounts receivables records to reflect the sales made, transactions completed or deliveries made at 246 Monroe, the defendant's store, they would not be out-of-state sales, would they?

*Testimony of James H. Micklish*

A. Sir?

Q. To the extent that anything in here reflects accounts receivable or invoices, whatever you copied them from, that were in fact transactions completed and deliveries made at 246 Monroe Avenue, Memphis, Tennessee, which is the location of Steepleton Tire Store, they would not be out-of-state sales, would they?

A. No, sir, I think they would be out-of-state sales.

120 Q. Your exhibit would be, therefore, in error at least to that extent?

A. No, sir. I say I think they would be out-of-state sales.

Q. Even though the whole transaction or delivery to the customer took place on Monroe Avenue in Memphis?

A. Yes, sir. The customer takes his vehicle and tires back over the West Memphis, Arkansas, and he is later billed at West Memphis, Arkansas, I think he is an out-of-state sale, yes, sir.

Q. That is the basis on which you accumulated your exhibit 1?

A. Yes, sir.

. . . . .

125 Q. Now, how did you go through the breakdown behind those totals in Exhibit 2 to determine whether or not there were duplications in here of the details, in other words, in exhibit 1, and because you have already pointed out you did not.

Mr. Tincher: If Your Honor please, let me see if I can clarify that point.

In substance, you see—

Mr. Mitchell: Mr. Tincher, if you will tell me, without telling him, but let this witness, in other words, answer the questions, unless you have objections.

126 Mr. Tincher: As I understood it, you did not call for an answer to the last question.



*Testimony of James H. Micklish*

But I think the form of the question calls for clarification which I am now preparing to make.

A. The sales for resale relate to the exemption question.

The sales to out-of-state customers relate to the coverage issue. Obviously, there are duplications, because many of these sales to out-of-state customers were for purposes for resale. At least, some of these were.

We did not attempt to make a breakdown to determine what portion of the sales to out-of-state customers related only to the question of engaging in interstate commerce, whether those customers probably fall within some of these additional groupings, as sales for resale, to fleet customers, or recaps at less than retail prices.

Those items have no relation, actually, to the Interstate Commerce Commission, and whether they fall in both groupings or not would be a fortuitous circumstance.

We are quite sure there are some customers in both groupings.

Q. All right, now, with regard to sales to International Harvester, which you have classified here as sales for resale—is that correct—every invoice, every receivable, every anything else you could find on Steepleton's records with respect to International Harvester are included in the total, which I believe is the sum of four thousand one hundred nineteen dollars and a penny?

A. Yes, sir.

Q. Or thereabouts?

A. Yes, sir.

Q. To what extent did you examine or determine whether or not Steepleton makes any sales to International Harvester for their own use?

A. We contacted Mr. Weaver at International Harvester, who indicated that all sales made by Steepleton to International Harvester were to be placed—for tires to be placed on their vehicles to be resold.

*Testimony of James H. Micklish*

Q. And you determined then from International Harvester that Steepleton only sold to them for resale?

A. Yes, sir.

Q. Did you go down and make any determination with respect to the other accounts accumulated among those sales for resale you had to the same effect, that is, whether or not the particular purchaser might buy a part for resale and a part for consumption?

A. No, sir.

Q. No, sir. To what extent, then, and how many  
128 different accounts, or what not, are subject to possible error on that score? Are all of them other than International Harvester—are they accumulated on sales for resale?

A. All of them other than International Harvester are tallied in invoices with respect to receivables ledger number 2, and in my understanding, sales to dealers.

Q. And that is accumulated by category of customers on Steepleton's books, not by use made by customers of tires?

A. Yes, sir, by category of customers.

Q. Now, with regard to national accounts transactions, you did not have any figure for national account transactions, as I recall, when we took your deposition the second time in this case, did you?

A. I should have, yes, sir.

Q. Well, where did you get the one you testified here about today of one hundred fifteen thousand dollars?

A. From accounts receivable records, of Steepleton Tire Company, under the heading "General Tire & Rubber Company."

Q. Were you not told on more than one occasion, and emphatically on the second and third occasion, by Mrs. Lauderdale—perhaps on another—that this memorandum account of General Tire Company was not a part of the

*Testimony of James H. Micklish*

regular, routine accounts receivable records of Steepleton Tire Company?

129 A. I can't recall that I was, no, sir.

Q. Did you inquire at all as to whether or not—or why it was the General Tire Company account was kept separate, or did you observe anything different in the way they were kept?

A. They were not kept separate, sir.

Q. Is it a fact, sir—pardon me, I did not mean to interrupt.

A. (Continuing) They were kept in the same file cabinet with the rest of the accounts receivable records and were filed alphabetically as with the rest of them. They were—they did differ on the face of them from the other accounts receivable records.

Q. Yes, sir. Were not those then carried simply in a memorandum account, by which certain information was accumulated until month's end when it can be cleared on some kind of clerical sheet with General Tire Company.

A. Yes, sir, substantially that is right, yes, sir.

Q. And that was the was—that constituted actually the way the accounts were in fact worked, that is, they appeared to be at least transfer memorandum accounts, did they not?

A. I could not tell from the records whether they were memorandum accounts or not. The amounts appeared on the face of the records, the amount of the  
130 transaction.

Q. Well, could you tell from the invoices themselves whether the absence of any dollar amounts from the invoices—did that indicate to you some difference?

A. On the invoices to General Tire and Rubber Company there were dollar amounts. On the invoices which corresponded to those national account sales and which were invoiced to the customer, there appeared no dollar amount.

*Testimony of James H. Micklish*

Q. Now, isn't it true, Mr. Micklish, that no dollar amount appeared on anything that the Steepleton Tire Company prepared with reference to the delivery of a certain size or type tire or tires to a customer, that the dollar amount appeared on what went in to the home office, that is, General Tire Company's home office, and the only dollar amount shown was inventory cost to Steepleton of the tire furnished?

A. Yes, sir, along with several other additions and deductions.

Q. From the value of the product, or Steepleton's own inventory cost—that is what that is, is that right?

A. That is my understanding of what it is, yes, sir.

Q. Then there would be certain allowances or deductions, depending on the amount of service, and so forth, rendered General Tire Company's customers?

A. Yes.

Q. And the transaction by General Rubber—at least by General—I assume any dealings were by Steepleton  
131 Tire Company with the customer of General Tire Company, the Akron Tire Company, for a price Steepleton does not know, whereupon, after the delivery is made, the Akron General Tire Company—The General Tire Company at Akron, replaces Steepleton's inventory and pays it some agreed service charge or commission, or how ever you want to call it.

A. It is my understanding that they credit their account. I was not aware that they replaced the inventory.

Q. I will take that correction. I don't know whether the inventory is replaced in kind or value.

A. Yes.

Q. But, in any event, the cost of the unit furnished is thereafter adjusted somehow with Steepleton, and that was made in the form of their commission for whatever is done?

*Testimony of James H. Micklish*

A. Yes.

Q. And this is not kept as a part of their regular accounts receivable records at Steepleton Tire Company?

A. Again, they are filed with the accounts receivable records, and they are kept with them. They are different transactions, though, certainly.

Q. What information, if any, did you get from Mrs. Lauderdale, again, with regard to those, either that you designated at the time of your first—and I am sure your subsequent investigations—that this was something  
132 different, these were memorandum accounts, these were not our accounts receivable, these are not customers, these are the basis of claims we make with General Tire Company?

A. She advised me that they were their national accounts.

Q. Now, then, with respect to this next exhibit, which I think is Exhibit number 5, in which at the back some several pages you have accumulated of apparently an inch thick, of which are invoices, the heading "Recapitulation of Sheets Number 2—2 through 6" apparently, and I hand you this, and I ask you if those particular last few sheets of your Exhibit number 5 were not prepared by you in an attempt to get at a differential, if any there might be, between the price at which Steepleton General Tire Company did recapping services for some customers and the price at which the same company rendered the same service for a different company?

A. Yes, sir, it was taken for comparison purposes.

Q. And after you had prepared those sheets and had analyzed them or reviewed them in the office, and in the taking of the last of your depositions in this case—let's take it on back—do you not admit that there was practically no difference in the price charged by Steepleton for its various recapping customers, that is that there was a standard, uniform price?

*Testimony of James H. Micklish*

133 A. With certain exceptions, yes, sir.

Q. Yes, sir. But this is a general statement that there was not much variation, it is pretty well a fixed price?

A. With certain exceptions.

Q. And at my request, you went through and made application of the last five or six sheets to your Exhibit 5, I believe—pardon me, let me check, just so the record will be correct—yes, the last few sheets of your Exhibit 5, and you made red circles around the invoice numbers of certain of the entries on those last few sheets.

Is that not true, that that was done because after you reviewed the analysis of the sheets you realized that you had made a mistake with respect to each one of the invoices which is circled in red, in terms of their being a price differential between one category and another category of customers?

A. No, sir. As far as the recapping goes, all these customers listed here, whether they are one, whether a small fleet operator or operator of several vehicles, received recapping at prices—at comparable prices.

Q. Yes, sir. So that there is not a differential made between prices charged for recapping by Steepleton to a customer with regard to whether he has got one, two, or many vehicles?

134 A. With the exceptions shown in this exhibit, that is basically true, yes, sir.

Q. I am still talking about the last few pages of that Exhibit number 5.

A. All right.

Q. And also the red figures—numbers—you caught where you first made a mistake when you first went through checking the invoice number, you thought they were at one price and later found out you were wrong that many times, is that not true?

*Testimony of James H. Micklish*

A. No, sir, the error was not in the pricing. It was in the size of the fleets.

You asked me to go through and check those fleets there I considered to be larger repetitive customers. And I did so. It had nothing to do with the price.

Q. Look at those there right now and see if they don't come out about the same price as the ones—the red circles of the larger repetitive purchasers.

A. Yes, sir, they do come out at about the same.

Q. And you checked them there and find, though, that you did not recognize they are larger repetitive purchasers from the prices charged them, they are all the people —you did not recognize them as large institutional  
135 purchasers that, in other words, from the price charged that Joe Doe, who never went over to Steepleton?

A. No, sir, from the material I checked that you have from me there with respect to prices, I think you may have compared prices at a later time.

Q. With respect to the first few recapitulations sheets of your Exhibit 5—and if I may, could I have that back, please, sir—it is your contention that respect to Carter Leasing, Continental Baking, Gordon's Transports, Kroger Company, and perhaps others, there are in fact several sheets of your Exhibit 5, that Steepleton does recap work for them at prices which is less than Steepleton does recapping work for other—for more general of its customers—right?

A. Yes, sir, on some tires.

Q. To what—tires—only on some tires?

A. Yes, sir.

Q. To what extent did you investigate any of these customers to find out whether the service that is rendered by Steepleton for any or all of them is the same as is rendered for the vast majority of Steepleton's recapping customers?



*Testimony of James H. Micklish*

A. Repeat that, sir.

136 Q. Yes, sir. Let's go back a notch. Recapping is a service, is that right?

A. Yes, sir.

Q. What Steepleton gets paid for is the service they render. If they render more service to one customer, would you think it is normal to charge that customer for more service than they would charge another customer who takes on himself the obligation to render some of the service himself?

A. That is logical, yes.

Q. Do you know whether that accounts for whatever differential you found and have expressed on the first several pages of your Exhibit 5?

A. No, sir. As a matter of fact, Mr. Steepleton stated that he was more or less compelled to do that because these national accounts had—have national competitive prices for which they were paid for recapping.

Q. Another account listed on the first few pages of Exhibit 5 is the Kroger Company.

You were present in the court room this morning when Mr. Hirsch testified as a representative of the Kroger Company. I think you will recall his testimony, as I do,

137 that at Kroger they pull their own wheels, they pull their own—break down their own tires, and all the Steepleton man does is pick them up and take them back to the shop—correct? No standing order of pulling the tires at Kroger Company.

Would that not possibly be reflected in the lower price that Steepleton charges Kroger Company for its recapping business?

A. I don't know, sir; possibly so.

Q. And all you know is what is reflected on exhibit 5, and these are the invoices made out in a little bit different form, are they?



*Testimony of James H. Micklish*

A. In some cases the invoices are different.

Q. But you do have a difference, necessarily, in the invoices and description, if it exists in the service reflected by the invoice?

A. Right.

\* \* \* \* \*

143 Q. Mr. Micklish, on the first sheet of your Exhibit number 2, which has to do, according to its caption, with dealer sales, I notice some remarks on a memorandum form, in which I take it you have made—this whole sheet is in your handwriting, is it not?

A. Yes, sir.

Q. Now, then, you have the notation, "included in these figures are sales to Tri-State Mack, Tri-State Leasing, Southern Motors."

The other part of the exhibit—is not that what Mrs. Lauderdale explained to you that sales to Tri-State Mack were not dealer sales by Steepleton General Tire Company at all, but were deliveries to a manufacturer under a contract that Tri-State Mack has with General Tire Company at Akron?

A. Possibly she did, sir. I don't recall but possibly she did.

Q. Can you explain further the fact that you have a notation on this exhibit that something was remarked about it, some distinguishing feature was made on it to you?

A. Well, I did that for my own benefit so that I would not think later it included sales to those people or re-include sales to those people as sales for resale,

144 because I would not pick them up again in some other category and include in sales for resale.

Q. But, with respect to whether or not a sale by Steepleton Tire Company to Tri-State Mack is a sale for resale, do you recall Mrs. Lauderdale advising you sales

*Testimony of James H. Micklish*

through General Tire Company delivered by Steepleton in Memphis to Tri-State Mack were similar to nation account transactions except they went under the manufacturers delivery agreement?

A. There was a discussion of manufacturers delivery agreement, or whatever it is called by, but I don't recall that she related it specifically to that information, although she may have done so, certainly.

Q. To any extent, did you take this manufacturers delivery transaction into account in any of your audit work or figures you have testified here today on cross-examination?

A. No, sir.

Q. With regard to Tri-State Leasing deliveries, that Mrs. Lauderdale explained that that was a company that leased vehicles or road equipment or something else, and that purchases in turn were for its own equipment to go on these vehicles that it leased?

A. Again, I don't recall, but I feel sure that she probably did, yes, sir.

145 Q. Well, you know in the list you included as resale dealers in your analysis?

A. If it is included in the ledger number 2 analysis of receivables, yes, sir.

Q. Well, there is your Exhibit number 2?

A. Yes, sir.

Q. And then with regard to Southern Motors, do you remember any explanation by Mrs. Lauderdale with respect to transactions at Southern Motors?

A. Yes, sir, as I recall she stated that for a time in—I believe would be including 1960, the company kept a salesman at Southern Motors in an attempt to sell the purchasers of new Cadillacs on the General Tire.

Q. Well, is it your understanding that there is also included, or is it in fact included in those so called dealer sales?

*Testimony of James H. Micklish*

A. Yes, sir.

Q. Now, then lower down on the same exhibit, I see a notation, which I take it there again would be of Mrs. Lauderdale, "includes the sum of \$7,759.60, Michelin Tire Company."

And that is explained: "delivered for Michelin Tire through Freuhauf and Arrow, received credit plus delivery charge."

146 A. Yes, sir.

Q. Does that refresh your memory as to why that particular notation was stated, or the notation showed?

A. Well, as I recall it, that is the only transaction there regarding Michelin Tire which appeared in the accounts receivable ledger 2, and I asked Mrs. Lauderdale about that specifically, and she made the explanation that they were sales or deliveries to those two companies, I believe, or something similar to the national account basis.

Q. Now, I believe that you, in addition to the accounts receivable, and inventory records, you have had access to a considerable amount of profit and loss statements, and also I think tax returns of Steepleton Tire Company, at least 1960 or maybe other years, did you not?

A. Yes, sir.

Q. On your audit of the profit and loss statements and/or tax returns, did you determine that the national account transactions were not there reflected in sales by Steepleton General Tire Company?

A. Yes, sir, they are not reflected as sales.

Q. And that tallies, does it not, with the explanation Mrs. Lauderdale gave you with respect to the General Tire Company and to the national account memo-

147 random items in their regular records or books, that is, this exclusion of national accounts from the regular transactions on the books of Steepleton Tire Company?

*Testimony of James H. Micklish*

A. It is my understanding they do not consider sales, yes, sir.

Q. All right. Now, as you testified, you worked from the Exhibit 6, which is the interpretative bulletin, the January 1960 issue, when you were preparing the audit or when you were conducting the investigation in May 1961, on which your first determination on findings was taken, and I would like to hand you this Exhibit 6 now, and ask you to turn to page 33, and let's run down this list of so called sales classifications and items pursuant to which you have contended that the—you say the automotive tire industry worked.

In the first place, am I not correct in thinking that the various classifications here attach significance to a particular tire dealer only in so far as they represent the percentage of total gross income from sales and services of the tire dealer?

A. By the percentage amount test, yes.

Q. Yes. And the distinguishing test in the percentage test is what the percentage is to the total, is that not it?

A. If they are all totaled. We have different categories, yes, sir.

148 Q. Yes. And what you would be concerned with is what percentage each one or the total of all these classifications represent of gross sales, services, of a given dealer?

A. Yes, sir.

Q. What was the total sales—services by Steepleton General Tire Company during 1960?

A. I don't have the gross dollar—annual gross dollar volume for 1960 other than the one that you—I believe you gave us.

Q. Well, what did you use, sir, for one hundred percent in making your reports and determination or finding with regard to Steepleton Tire Company in May of 1961,

*Testimony of James H. Micklish*

or any time since then, for the benefit of your superiors?

A. In May of 1961 I used gross dollar volume, I am not quite sure now where it came from, but I would imagine from the sales tax reports, and to that I added the national account sales, to come up with that I considered the gross dollar volume.

. . . . .

158 By Mr. Mitchell:

Q. Well, what is the figure, Mr. Micklish, for the total gross dollar volume of sales at Steepleton General Tire Company during 1960?

A. Sir, I can give you the figures if I can step down and get my original case file. I can give the figures that I used then.

Q. But my question is this.

A. (Continuing) But I have not arrived at any gross dollar volume for the year 1960 in this present development. But I can—

Q. For clarification, how do you use “in this present development”?

Have you derived one, sir?

A. For my original investigation, yes, sir.

Q. And what was it?

A. \$1,029,014.00.

159 This included national account sales.

Q. Now, would you tell me what you are referring to from your file, if I am familiar with it or if we have ever talked about it in taking of your deposition?

A. Yes, sir, in my original first analysis of my file as Exhibit E assigned—

Q. Exhibit 2 is the way it came in this record. As an exhibit to your deposition in the first instance?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

*Testimony of James H. Micklish*

Q. That is the exhibit Mr. Tincher has made a number of statements in the record, and which you have concurred on those, to the effect that you no longer rely on Exhibit 2 as to the conclusions reached, and the figures shown there are no longer correct, is that true?

A. Yes, sir.

Q. But that is nonetheless the figure for your gross sales, that same exhibit that has since been abandoned by the plaintiff in this case?

A. What for?

Q. That is nonetheless the only source in your work paper for the gross dollar volume of sales in 1960 of this defendant, that is, Exhibit number 2 of your original deposition?

160 A. Yes, sir, this is the only gross that I have, and in my working papers. Whatever went on between any of the other parties, I don't know, but this is the gross that I had.

Q. And that comes from what I know here as Exhibit number 2 to your original deposition, and it has since been abandoned in your testimony, the second deposition that the plaintiff no longer relies on such thing as being entirely accurate; is that not true?

A. Yes, sir.

Q. Then, using whatever you use for gross dollar volume during 1960, in this same Exhibit 6, which is the interrelative bulletin of January 1960, you have given the figure for sales for resale, and it was made an exhibit this morning, or sometime today, to your testimony.

Under the second of several classifications, there is a category "sales made pursuant to a formal invitation to bid."

Now, during any part or all of the three audits you have made of the defendant's records, did you establish a value for sales made pursuant to formal invitation to bid by Steepleton General Tire?

*Testimony of James H. Micklish*

A. No, sir.

161 Q. And another thing regarding categories is "sales to national accounts." We already have an exhibit in regard to that. And you have indicated it is included in the total of sales by Steepleton during 1960.

A. Yes, sir.

Q. The next item is "sales to fleet accounts."

I am reading paragraph 4 in the right hand column of page 33. And I want to pick out some several points about this with you.

"Sales to fleet account at wholesale prices: As used in this section, a 'fleet account' is a customer operating five or more automobiles or trucks for business purposes."

Now, "Wholesale prices for tires, tubes, and accessories are prices equivalent to, or less than, those typically charged on sales for resale."

First, did you determine whether or not there were any truck tires and automobile tires sold for resale by Steepleton General Tire Company which you could use as the indicating measuring stick under this paragraph to determine what is here called wholesale prices?

A. Yes, sir, there were sales of new passenger tires for resale.

162 However, I ran across no sales of any truck tires for resale with the exception of two transactions involving Michelin tires.

Q. And Michelin is in sort of a separate category in this case, are they not?

Do you recall that it is generally sold at the same price, and you know it is handled more or less a second item by this defendant?

A. Generally, yes, sir.

Q. So, with respect to truck tires, I think you said you had no measuring stick to which this is related, is that correct?

*Testimony of James H. Micklish*

A. Yes, sir.

Q. So, in this bulletin:

“If the establishment makes no sales—” Skip down.

“If the establishment makes no sales of truck tires for resale, the wholesale price of such tires will be taken to be the price charged by the establishment on sales of truck tires to fleet accounts operating ten or more commercial vehicles.”

Were you able to establish that?

163 A. Yes, sir.

Q. In your opinion, do you now know which accounts have ten or more vehicles?

A. I know some of them that do.

Q. There were some thirty-four in this exhibit. Do you know that all those thirty-four accounts actually operated—buy tires for ten or more, or did in 1960, ten or more vehicles?

A. I think there are some fifty in there. And, yes, sir, I know from talking to the people at the various establishments that they did operate ten or more in 1960.

Q. And it says further that: “If the establishment makes no such sales”—then I think it will be with respect to truck tires in the Steepleton category—“The wholesale price will be taken to be the price typically charged in the area on sales of truck tires to fleet accounts operating ten or more commercial vehicles.”

A. Yes, sir.

Q. Have you established what prices are in this area by competitors of Steepleton?

A. No, sir.

. . . . .

166 By Mr. Mitchell:

Q. With regard to those sales by competitors, which is the way I think you would have to construe this “typically charged in the area” phrase on the next to



*Testimony of James H. Micklish*

last line of paragraph 4, did you make any determination or do you have anything in the file—any figures which show prices typically charged in this area by Steepleton's competitors?

A. No, sir.

Q. So, in applying paragraph 4, you had to go back to the prices that you determined were charged by Steepleton to fleets that you ascertained, to your satisfaction, at least, had more than ten vehicles, is that correct?

A. Well, of course, the prices charged these customers appeared on the customer's records.

Q. Yes, sir. But you had to go down and select companies that you either guessed or made some determination and came to some conclusion about the number of vehicles operated by particular customers.

A. Yes, sir.

. . . . .

168 A. No, sir.

Q. The next is "Sales of servicing and repair work performed under a fleet maintenance arrangement on trucks—" et cetera—"whereby the establishment undertakes to maintain the tires or tubes for a fleet account at a price below the prevailing retail price."

Now, first, with respect to that, did you conduct a survey or study or make any inquiry or take any steps to determine what the prevailing retail price was for whatever kind of servicing and repairing work is mentioned in this paragraph?

A. I did not determine what the retail price was, no, sir. But I did determine that there were accounts

169 which received recapping services at less than the prevailing retail price, because they received recapping services at less than what the majority of their customers received recapping service for, and less than what the price list showed.

*Testimony of James H. Micklish*

Q. So that when you could not perform in accordance with this paragraph 6, you just came close to it and gave up on that and was satisfied, is that right?

A. No, sir, I came up with a figure which indicates the total sales to their recapping service customers at less than prevailing retail prices.

Q. Although you said to begin with you did not establish—did not determine, you said, what the prevailing retail price is—or was in 1960, sir?

A. No, sir, I did not. But if the majority of their accounts are receiving their recapping at a greater price—price greater than these few accounts, then I considered that they were receiving recapping services at prices less than retail.

Q. Yes. And this has to do with your Exhibit—I don't know the number—but it is the one in which you have got recapping for so called fleet accounts?

A. Yes, sir.

Q. You picked up Kroger and one or two or three other larger accounts. And those figures are supposed  
170 to reflect that Kroger gets the same service as does the run of the mill recapping customer of Steepleton Tire Company, but pays less for that same service, is that correct?

A. My records reflect that they pay less for their recapping service.

Q. They pay less for whatever they get. Of course, they may get something different from the way you have now qualified your exhibit, they may get less and therefore pay less, is that not correct?

A. I don't know that they get less, sir. I know that they pay less for recapping. I am sure the recapping—quality of recapping and quantity of rubber is the same in any other tire.

Q. What about the amount of service in putting the

*Testimony of James H. Micklish*

tire off and on, or what about whether or not on the matter of when you put on—or changes them—whether or not Steepleton has got to do it then, or where the job is done? Do you know about that factor?

A. Nothing, that is right.

. . . . .

173

**Redirect Examination,**

By Mr. Tinchcr:

Q. Mr. Micklish, you were asked by Mr. Mitchell whether you had found any sales by Steepleton Tire Company that were made pursuant to governmental invitations to bid.

Do you have any information with reference to sales made to the City of Memphis?

A. Yes, sir. He asked me if I had any notations on that. I have my notes on that.

It is my understanding sales to the City of Memphis are made pursuant to invitation to bid.

Q. From where did you get that understanding, Mr. Micklish?

A. From information furnished by Mr. Steepleton.

Q. In fact, did he testify to that fact in depositions that were taken on January 3, 1962?

A. Yes, sir.

Mr. Tinchcr: If Your Honor please, I wish to now place in evidence the deposition of Mr. Steepleton that  
174 was taken on January 3, 1962.

. . . . .

176 By Mr. Tinchcr:

Q. Now, Mr. Micklish, did you transcribe from  
177 the company's records information to show sales made by Steepleton Tire Company to the City of Memphis?

*Testimony of James H. Micklish*

A. Yes, sir, I did.

Q. Where would those transcriptions be found among the exhibits that have been here admitted or marked for identification purposes?

A. It would be found in the Exhibit 4, and also—no, City of Memphis would be part of Exhibit 4.

\* \* \* \* \*

179 Q. Now, Mr. Micklish, could you turn in this exhibit which has been identified as Exhibit number 4 and signed the transcription relating to sales to the City of Memphis?

(Document examined by witness)

Q. Have you found it?

A. Yes, sir.

Q. Do you have any totals with reference to sales on the sheets before you?

A. I have the columns totals, but I don't have a complete total.

Mr. Tincher: All right.

180 Mr. Mitchell: Could we have the identification there on the number of the sheet?

Mr. Tincher: Yes.

Q. Would you give the number of the sheet that relates to sales of the City of Memphis.

A. Pages twenty, twenty-one, twenty-two of the Exhibit that is now 4, but which in my original deposition was 13-B.

Q. In addition to sales to the City of Memphis, Mr. Micklish, did you obtain from the company's records transcriptions of the sales to other governmental units?

A. Yes, sir.

Q. What—which of your exhibits will that cover that has been made part of the record in this case?

A. They appear in two different exhibits now, Exhibit 4 pertaining to the fleet account sales, and also listed in

*Testimony of James H. Micklish*

the Exhibit 1 pertaining to the out-of-state customers, as some of these counties and city governments were outside the State of Tennessee.

Q. Would those sales be duplicated in both exhibits, or would part of those sales be reflected by Exhibit number 1 and part by Exhibit number 4?

A. There is no duplication at all. Part of them will be part in Exhibit 1, and part of them in Exhibit 4.

Q. In what category of sales with reference to the 181 interpretative bulletin that was made Exhibit number 6 did you include these sales to various governmental units such as the City of Memphis and various counties, schools, road developments, and so forth, in other states?

A. I included them in the category with the fleet accounts operating ten or more vehicles.

Q. Did you ascertain during the course of your investigation whether or not the price charged by Steepleton Tire Company to the various governmental units was greater or less or the same as the price charged to the fleet accounts?

A. That is normally on what is called State list price, which is at less than it would normally—what the fleet account would pay.

Q. Does that relate to new tires, or to recaps, or both?

A. No, to new tires, to new tires only.

And during my initial investigation, Mr. Steepleton indicated that the price charged these governmental units were in many cases less than his purchase price—his cost.

Q. All right. Did you learn the manner in which Mr. Steepleton is able to complete transactions to these governmental units at less than his purchase price without losing money?

A. Yes, sir, he is credited with his purchase price  
182 plus a certain percent for selling tires.

. . . . .

*Testimony of Frank Phillips*

186

**FRANK PHILLIPS,**

having been first duly sworn, testified as follows:

. . . . .

189

**Cross-Examination,**

By Mr. Burch:

Q. Mr. Phillips, where is your place of business located?

A. 507 East Brooks Road.

Q. We are concerned only with the year 1960. And in that year, according to best recollection, you operated about sixteen vehicles, half leased and half owned?

A. Yes, sir.

Q. Is that substantially correct?

A. Yes, sir.

Q. Under the provisions of your lease contract, was it up to you to furnish the tires for the leased vehicles, or did they come with the lease?

A. No, sir, they furnished everything.

Q. So you weren't involved with the tires for those vehicles at all, were you?

A. No, not unless they asked me.

Q. Yes, sir. With reference to the tires you bought from Steepleton, would you say the tire business is a highly competitive business?

A. Yes, sir, it is.

Q. As a matter of fact, you, like most people, you go where you get the best price and the best service?

A. That is right.

190 Q. As a matter of fact, or really, you haven't bought many new tires from Steepleton, have you?

A. No, I haven't bought any tires from him in over a year.

Q. We have got some lawyers from some of these territories here and don't want to hurt their feelings any more than necessary, but actually, if a man can get a good

*Testimony of Frank Phillips*

price, it doesn't make much difference whether it is Firestone or Goodyear or what?

A. No, sir.

Q. Did you get servicing with the tires you bought from Steepleton?

A. See, most of my business with Steepleton was recapping. I would get recaps. He would come pull the tires, mount my tires, and thereafter he would bring the tire when he finished with it. But back in 1960, I bought very few tires from him.

Q. With reference to recapping, did you use all those recaps yourself or did you sell some of them?

A. I can't answer that completely. I would say I used ninety-five percent of them.

Q. You bought them—?

A. I might sell them only in a tight, if a boy had to have a tire or something. I did not get them for sale, is what I am saying.

191 Q. As far as both intended and normal use were concerned, you used those recapped tires?

A. Yes, for my own use.

Q. And did not hold those recaps in stock for sale to a customer?

A. Oh, no, sir.

Q. In so far as the recaps you got from Steepleton, even though you had bought and paid for the tire, Steepleton did continue to give service, did he not?

A. Yes.

Q. From your knowledge of buying tires, was this a retail or wholesale transaction you had with Steepleton?

A. Well, I would consider in my case—I guess it would be—I don't think I bought them wholesale. The fact is, his recaps were around ten dollars each higher than the rest of the people in town. But I think that the difference would be in the type capping they got.

*Testimony of Frank Phillips*

Q. Just give a better cap?

A. Well, they run better for me.

Mr. Burch: Run better for most people.

That is all.

**Redirect Examination,**

By Mr. Tinch:

Q. Just a minute, Mr. Phillips, I have one or two  
192 further questions.

Then, if I understood you correctly, as far as you were concerned, the difference in price with reference to the recapped tire was a matter of quality?

A. Well, you got to figure this way. His tires were about thirty-five dollars roughly, for a recap, against in some cases here in town twenty-five. So you have got to take into consideration, if you are going to pay ten dollars more, I feel I get a good bit of service plus the fact I get a better cap, which I deducted against the—in other words, I am trying to say with him I got the service.

Mr. Tinch: Yes, sir.

A. (Continuing) Not disparaging to anyone, but, as I say, I am stating a fact.

Q. All right. With respect to the purchase of new tires from Steepleton, and in the year 1960, which Mr. Steepleton's records indicate something like fifteen hundred dollars worth of new tires?

A. Yes, sir.

Q. (Continuing) —Sold to you during that year. Does that sound correct?

A. Yes, sir, I am sure that is correct.

Q. In connection with those new tires that you  
193 bought, were you buying those tires at fleet discount?

A. Well, that I could not say because I have never been able to figure how they arrive at their prices.

Q. Did you—



*Testimony of Frank Phillips*

A. (Continuing) In other words, I don't know what a fleet discount is. I don't know how they arrived at it, that is what I am saying.

Q. When you bought those tires, did you deal with one of Mr. Steepleton's outside salesmen?

A. Yes, sir.

Q. Who was that salesman in 1960?

A. I believe it was Mr. Nash.

Q. You believe it was Mr. Nash. In making the sales to you, did he discuss the basis on which he would arrive at the price you would be paying?

A. No, sir, he did not. He quoted me a price, including everything in the sales—the service man might call, and including all taxes.

What I mean is we normally—they say so many tens discount, two, three, four tens, whatever the discount means. But you can't tell anything by that. In other words, I want to get a pencil—I want to know how much do the tires cost me.

194 Q. You say ordinarily the salesman would approximate two tens—three tens off listed price.

Do you recall whether Mr. Steepleton's man did that in quoting the price of tires?

A. No, sir, he would tell me the tires cost so much, because, as I say, when they start talking tens—five or ten minutes before you get down to prices.

Q. In other words, you want the tire salesman to get precise when they figure the cost of a sale?

A. They might start, but then I would tell them to tell me how much it costs.

Q. When that was done and the various salesmen would end up with prices which indicated to you the cost to you of the particular tire, did you find that Steepleton General Tire was competitive in price with Firestone and others?

*Testimony of Frank Phillips*

A. Well, very frankly, I think you will find that I did not, because I must have bought probably ten thousand dollars worth of tires, and is true I bought some fifteen hundred dollars worth from Steepleton.

But I would have to say at the time I bought the fifteen hundred dollars they are bound to have been competitive or I wouldn't have bought them.

But now frankly, I think they were higher, just like they were with caps. But still, he has got a good 195 tire, but still I think four or five of them has got good tires.

Q. During the course of 1960, did you buy any tires on behalf of the men who were operating the trucks you leased?

A. No, I did not. It may be in 1960 that a few times I may have sold one of the operators a tire. Maybe if he would come in at six o'clock in the afternoon and have kicked out a hole, I could sell him one of my tires. But that is only as a favor. If, in other words, I sold him a tire strictly what I paid for it, which he could go down town and buy it, but maybe late on Saturday and I have maybe from time to time sold maybe two percent of the tires that maybe I used. But normally I did not want to get involved in that.

Now, some of them bought from Steepleton but it was strictly on their own.

Q. All right. In those instances where they bought tires from you because of the time element involved, or something, would those drivers pay you for the tires?

A. Yes, sir.

. . . . .

*Testimony of John K. Wood*

201

**JOHN K. WOOD,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tinchler:

Q. You are Mr. John K. Wood?

A. Yes, sir.

Q. Are you Manager of White Rose Industrial Laundry located here in Memphis?

A. Yes, sir.

Q. Were you holding that position in 1960?

A. Yes, sir.

Q. In the year 1960, did your company patronize Steepleton General Tire Company for tires and recapping service?

A. Yes, sir.

Q. And other car maintenance service?

A. Yes, sir.

Q. Will you explain the nature of the services and sales that were made to you by Steepleton Tire Company in that year?

A. Mr. Steepleton furnished us with part of our tires and service, they regularly inspected our local fleet, by repairs, recapping, and so on.

202 We have our own fleet maintenance, which consists of three mechanics. But in addition to that, Steepleton took care of all of our tire problems.

Q. All right. Now, in what territory—

A. (Continuing) Let me qualify that, please, sir.

All of our tire problems as far as recapping and servicing was concerned, and some new tires.

Q. Does that include removing the tires?

A. Yes, sir.

Q. (Continuing) —that needed recapping?

*Testimony of John K. Wood*

A. Yes, sir.

Q. And installing other tires for use on the trucks?

A. Yes, sir. It was just left up to them.

Q. Then, in what territory outside of Tennessee did your fleet trucks operate in 1960?

A. Well, here is a little peculiar thing, that most of our fleets—we operate in portions of six states, as far away as three hundred fifty miles. And fifteen of our trucks are domiciled entirely away from here. We may see them once a year. And four operate out of here exclusively into—well, northern Mississippi and eastern Arkansas. And four others operate into that same area one day a week. So it is a little peculiar.

The balance of the trucks operate entirely locally in Tennessee.

203 Q. Will you tell us how many trucks your company was operating, approximately, in 1960?

A. I can't tell you exactly, because our fleet fluctuates from time to time, but have seventy-five cars and trucks at the present, and had that many at least in '60.

Q. Were those commercial vehicles used in business?

A. Yes, sir.

Q. Were you purchasing tires and tire servicing during the year '60 for all of those vehicles?

A. Yes, sir.

Q. At various times?

A. Yes, sir.

Mr. Tineher: You may question him.

**Cross-Examination,**

By Mr. Burch:

Q. Mr. Wood, is there competition in the tire business?

A. I would say it compares very favorably with the automobile business, you know, on prices.

Q. You don't go for any particular brand, you go for price and service, do you?

*Testimony of John K. Wood*

A. No, on occasion, such as recapping and that type work it is mainly service.

204 Q. You were in the courtroom and heard another witness testify he paid thirty-five dollars for a recap, and it is more than at most, because the service is better?

A. I did. And we pay Steepleton from fifteen to twenty-five percent more for servicing recaps than we can get it for elsewhere.

Q. You are referring to Steepleton.

A. Yes.

Q. Is this because of service?

A. We think their quality service and their quality caps is worth the difference.

Q. You don't buy recaps for resale, do you?

A. No.

Q. You use them up yourself?

A. Yes, sir.

Q. Something has been said in the course of somebody's testimony about price—I believe the preceding witness.

Do you find that because you operate sixty-five vehicles that you necessarily—

Mr. Ray: Seventy-five.

Q. (Continuing) —seventy-five—Mr. Ray has corrected me—that you necessarily get a better price than an individual on purchasing new tires?

205 A. No. I can elaborate just a minute.

Mr. Tincher: Yes, sir.

A. (Continuing) People are always asking me—several years now—I had been with the business thirteen years, in the capacity of Manager twelve—like to do friends a favor. And sometimes a friend—try to get a friend a tire wholesale, and find he could go to Sears-Roebuck and get it as cheap as I can.

I don't think there are any tire prices, don't believe we

*Testimony of John K. Wood*

are buying wholesale. If there is any wholesale, I don't know.

Q. If there is any great big volume discount, you are not getting it for seventy-five trucks, are you?

A. No, sir.

Mr. Burch: That is all.

**Redirect Examination,**

By Mr. Tincher:

Q. In that connection, Mr. Wood, in dealing with tire salesmen have you seen that the salesman will quote discount, say on multiples of ten off from this price?

A. They don't come in too often with that, frankly.

I may be a sort of peculiar person but after I get  
206 to doing business with a man just over a period  
of years, I usually get to the point I don't even  
listen to anybody any more. If he has got something I  
am satisfied with, and if a salesman comes in to us—and  
again, I don't want to be disrespectful to the tire sales-  
man and the companies here, either—and I am satisfied  
with where I am buying tires and probably won't be  
making any change from Mr. Steepleton to service that  
is lousy.

Q. In purchasing tires, are you buying at what is known in the truck trade as fleet discount prices?

A. I doubt if I could even answer it. We don't check prices with the Steepleton salesmen, don't find what this tire costs in St. Louis. If we need tires, order tires once or twice a year, maybe check other tire companies to see if we are getting the price. If we would say, "Fine, we will buy Steepleton's," and I will discuss it occasionally with my fleet superintendent, and we both feel it is worth the difference.

That is the best I can answer.

Q. The difference is for the service?

*Testimony of John K. Wood*

A. They are generally a little higher all the way through. They are generally a little higher on tires, they are generally a little higher on capping.

Q. Do you feel that is accounted for there by the  
207 difference in quality and additional service that is provided in connection with the maintenance of the tire?

A. We think it is definitely accounted for in so far as services is concerned.

You could argue the point whether those tires are worth any more than Firestone or Goodyear, and really couldn't answer it.

Talk about cost—when you got seventy-five different trucks you have got seventy-five drivers. No driver will drive a truck in the same manner. But whether you are going to get five thousand miles on one, ten thousand on another—by different men.

So it would be hard to say if the tires are worth more, don't you see.

Q. If I understood correctly, you testified you could not say whether tires were bought at wholesale.

Now, I would like to ask you whether you are in position to say from your mode of buying tires over the years that you are buying them at retail.

A. We are not buying them at retail.

Q. Would you explain what you mean by that?

A. Well, tire dealers have—I was in the tire business  
many, many years ago—they have what is called  
208 list price, which is like you go down and buy a car—a sheet of paper there we would call list price.

But doesn't anybody pay list price. I bought a car the other day nine hundred dollars off list price. So what is list price? They don't mean anything either.

Q. But your answer, with reference to the purchase of new tires, is, as I understand it, "We do not buy them at retail"?

*Testimony of John K. Wood*

A. We don't pay manufacturers published list price for them, don't think anybody does.

Q. Do you also buy accessories and parts for your various trucks?

A. Yes, sir.

Q. Do you know whether in purchases of parts you buy at wholesale or at retail, or some other classification?

A. Well, we get invoices for people like Standard Parts—I believe I am correct—you know, you look at these things every month, and the first thing you know you are not even seeing them. I think there is only one price—sort of price. Whether wholesale or retail, I don't know. It is wholesale, I guess, because I don't believe Standard Parts could operate if not competitive there with Mills-Morris and other companies. We are getting some kind of discount on parts, of course.

209 In operation of the business, do you find that on supplies in the business you use in day to day normal business that you are able to buy them at discounts from retail prices?

A. Yes, sir.

Q. Would that be with reference to all your supplies, your tires, your parts and other supplies that you use in the business?

A. I suppose it would.

Mr. Tincher: That is all.

**Recross-Examination,**

By Mr. Burch:

Q. Mr. Wood, you would not say, from your experience, would you, the fact that you receive a discount makes the transaction a wholesale transaction?

A. I don't know. Someone would have to qualify to me what is wholesale—retail—before I could answer. So



*Testimony of John K. Wood*

that—only thing I could go by is comparison between one company and another.

Q. Suppose you do a lot of shooting and bought a lot of shotgun shells, used two or three cases a season, and you go in there and buy those shells and the fellow  
210 says, "I will give you ten cents a box off."

You know that is still a retail transaction, but you got a discount?

A. Yes, sir.

Q. Of course, the wholesale transaction is the transaction of the man that bought them for resale from the distributor.

A. That is what I should think.

Q. That is what you normally think, isn't it?

A. Yes, sir.

Q. And the large users frequently get discounts, and good customers frequently get discounts, but they are still retail transactions, aren't they?

A. That is right.

Q. He has asked you about it. Wouldn't you say that generally the idea of purchasing for resale is what makes ordinarily a wholesale transaction as distinguished from retail?

A. I would think that if I were buying tires wholesale, what I would determine being wholesale, I would be buying direct from General Tire factory or Firestone Tire factory, and the middle man would not be there.

For example, Firestone dealers and Firestone stores will buy tires some place, but they will turn around and  
211 sell the tire to me.

Q. Isn't it then that those items you get to conduct your service and the products you buy to use yourself—is that something usually associated with retail transactions?

A. Yes.

*Testimony of Edwin W. Andrews*

Q. For instance, if you go down and buy a carload of tires in some transaction, you would not expect them to send a carload truck out on the road.

A. I wouldn't get that, no, sir.

\* \* \* \* \*

212

**O. D. BLACK,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tincher:

\* \* \* \* \*

213 Q. Did your company have an arrangement whereby Steepleton Tire Company would send service men to check the vehicles regularly, or would they come only on call?

A. They generally checked them on the weekend without calling them, and then during the week they would come down when we called.

\* \* \* \* \*

215

**EDWIN W. ANDREWS,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tincher:

Q. Will you state your name, please, sir?

A. Edwin W. Andrews.

Q. By whom are you employed, Mr. Andrews?

A. Klinke-Reed Dairy.

Q. In what capacity?

A. As Sales Manager.

Q. Did you hold that position in 1960?

A. About half of 1960.

*Testimony of Edwin W. Andrews*

Q. As Sales Manager, were you in position to know how many vehicles Klinke-Reed Dairy was operating in 1960?

A. About fifty.

Q. About fifty vehicles?

A. Yes, sir.

Q. Do you know throughout the year how many they were operating from other some other position you held with the company?

A. You mean all of 1960?

Mr. Tineher: Yes.

A. Be about the same all year, yes, sir.

216 Q. And did your company patronize Steepleton General Tire Company in 1960 for the purchase of new tires and recapping service and tire maintenance service?

A. We did.

Q. In what areas do those some fifty trucks of Klinke-Reed Dairy operate?

A. All of them operate in Shelby County except three that were in Arkansas.

Q. Did they cross back and forth between Tennessee and Arkansas?

A. Yes, sir.

Q. Did your company have an arrangement whereby the Steepleton Tire Company would send a service man with his truck on regular occasions to your place of business?

A. They were at our place of business about every day. Of course, they were usually on call, but they kept our fleet up, and normally they checked it I think on week-ends, too, but it was left up to them.

Q. Was the servicing arrangement similar to what you have heard testified to here before, namely that Steepleton's service man would remove tires that needed recap-

*Testimony of Edwin W. Andrews*

ping and repairing, and mount other tires on the wheels of your truck?

A. That is correct, yes, sir.

217 Mr. Tinch: That is all.

**Cross-Examination,**

By Mr. Burch:

Q. Mr. Andrews, have you got a television?

A. Yes, sir.

Q. And you know, if you are like most of us and go down to a television store and buy a television, you get a service warranty, when if it breaks down the man comes out and looks at it for you, does he not? Is that right?

A. Yes.

Q. But if you are like some more of us, ~~me~~ included, you get some friend to get you an in down at Orgill Brothers, and buy it wholesale, you don't get any service, do you?

A. That is normally correct, yes sir.

Q. You got a service warranty—you got the service on these tires, didn't you?

A. Yes, sir.

Mr. Burch: That is all.

**Redirect Examination,**

By Mr. Tinch:

Q. Did your company buy any tires, Mr. Andrews, as an accommodation for employees of the Klinke-Reed Dairy?

218 A. Not to my knowledge in 1960. I think we have maybe in past years, but not in '60, I don't think. Don't recall—I didn't, anyway.

Q. Could you state whether or not purchases of tires at Steepleton General Tire Company in 1960 were at fleet discount prices?

*Testimony of Woody Herrin*

A. I couldn't answer that. I think it was at the fleet price. At least, I presumed it was at the fleet price, but as far as a fleet discount, no, sir, I don't know.

Q. Did you from time to time deal with other truck tire salesmen other than those from Steepleton Tire?

A. Toward the end of 1960 I bought tires elsewhere, yes, sir.

Q. And in dealing with these other tire salesmen, were you quoted fleet discount prices?

A. No, sir.

Q. Did you get any sort of discount in connection with the purchase of tires from Steepleton Tire Company?

A. Not to my knowledge. Now, the price was all set up before I came back, so far as I know.

Our prime purpose was the service with Steepleton.

Now, whether there was any discount on any invoice—I don't remember ever seeing that, no, sir, and I check those.

Q. In your purchases of tires, had the arrangement with reference to price and so forth been set up between  
219 your company and Steepleton Tire Company before you were given responsibility for buying new tires?

A. Yes, sir, it had. In fact, we have been with Steepleton for many years. And one of the owners actually set it up—oh, back in 1940 or so, I am not sure just when—primarily due to service.

. . . . .

220

**WOODY HERRIN,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tinch:

Q. Will you state your name and address, please, sir?

A. Woody Herrin, 362 Washington Street.

*Testimony of Woody Herrin*

Q. What business do you operate, Mr. Herrin?

A. Produce business, fruit and vegetables.

Q. Will you explain the territory you operate in and the nature of your operation?

A. Well, I pretty well operate nation-wide, all over the United States. I have trucks that haul produce from California, Florida, clear into Washington, practically every state of the Union.

Q. Are those over-the-road tractor-trailer trucks?

A. Yes, sir.

Q. Are any of them refrigerated?

A. All refrigerated, yes, sir.

Q. How many vehicles were you operating in the business in the year 1960?

A. You mean over-the-road trucks?

Q. All your vehicles in your produce business.

A. All vehicles—let's see. In the neighborhood—  
221 delivery trucks and all, about twenty.

Q. All right. How many over-the-road trucks, Mr. Herrin?

A. Eight.

Q. Eight over-the-road trucks?

A. Yes, sir.

Q. Would delivery trucks be used transporting merchandise outside the State of Tennessee at any time?

A. Yes, occasionally we go over to Arkansas.

Q. Were you buying truck tires from Steepleton General Tire Company in 1960?

A. Yes, sir.

Q. Were you having truck tires recapped in that year?

A. Yes, sir.

Q. By Steepleton?

A. That's right.

Q. Did Mr. Steepleton have a service man that called at your place of business in connection with taking care of your tires?

*Testimony of Woody Herrin*

A. Yes, sir.

Q. Was that done on a regular basis, or just when called?

A. No, regular.

Q. When and how often would they come?

A. Well, of course, I have a man that looks after my trucks. But if I remember right, a couple or three  
222 times a week. In other words, they would try to come out when the trucks were in, you know from the west coast.

Q. By trucks being in, you mean some of those over-the-road trucks?

A. Right. They wouldn't all be in at the same time, see. You know, might be two today, two tomorrow—one today, three or four tomorrow, something like that.

But, when they are in there, servicing, see—see the tires, and if it needs recapping, or he always keeps the proper amount of air, what not.

Q. What would be the nature of the work done by Steepleton Tire Company service man with reference to your over-the-road vehicles, the ones that went in many different states, when they were at your place of business?

A. You mean the man that checked the trucks?

Q. Yes, the Steepleton employee.

A. Well, he would come in, check each tire to see whether or not they were satisfactory in every way, or see if the driver was keeping the proper amount of air, best of my knowledge, then to see also if the tire was needing recapping, or if it needed to be transferred from one wheel to another—transferred it around over the truck.

Q. Is that transfer from one wheel to another any  
223 matching—mating?

A. Sir?

Q. Any matching or mating, is that what you call it?

*Testimony of Woody Herrin*

A. That is right.

Q. Would that involve taking a tire off of one wheel and installing it on another wheel?

A. It would.

Q. That would be done by the Steepleton employee?

A. It would.

Q. If the tire needed to be taken off and recapped, did the employee remount another recapped tire on the wheel?

A. That is right.

Q. Did the Steepleton Tire Company do the recapping of your tires during that year?

A. Yes, sir.

Q. Did you also buy new truck tires from Steepleton in the year 1960?

A. Yes, sir.

Q. Would you state whether or not you were buying those tires at retail prices?

A. At retail, no. I was considered a fleet owner truck, and you have fleet owner discounts, and we would buy at fleet owner's discounts.

Mr. Tincher: Your witness, Mr. Burch.

224

**Cross-Examination,**

By Mr. Burch:

Q. Did you consider that you were buying at wholesale prices?

A. Wholesale, yes, sir.

Q. Because you got a discount?

A. Well, I would consider it that way.

Q. Did you buy any of them for resale?

A. No, sir.

Q. Do you consider that every item you get at a discount is what you call getting wholesale?

A. State that again.



*Testimony of John S. Robilio*

Q. Do you consider that every item that you get a discount on, you are getting wholesale?

A. Not necessarily, no.

Q. Well, what is the difference?

A. Well, maybe I misjudged that as wholesale. But the fleet owner—in the trucking business we get a discount. That could be retail with the discount.

Q. That is what we are coming to. That is what you got, isn't it?

A. I suppose that is what you could call it.

Q. Actually, you got a discount off——?

A. By being a fleet owner.

225 Q. That is right. But you never carried them in any wholesale operation?

A. Well, I never resell them.

Mr. Burch: Any of them?

A. No.

. . . . .

226

**JOHN S. ROBILIO,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tincher:

Q. Will you state your name, please, sir?

A. John S. Robilio.

Q. In what business are you engaged?

A. Food manufacturer, macaroni products.

Q. And are you the Robilio of Robilio and Cuneo?

A. Well, I am one of them. I have a brother that is interested in the business, that is Albert Robilio.

Q. At any rate, you are part owner of the business?

A. Yes, sir.

Q. In manufacturing food products?

A. Yes, sir.

*Testimony of John S. Robilio*

Q. Does the company operate any trucks or commercial vehicles in that business?

A. The only trucks we operate are our trucks.

Q. How many?

A. For our own deliveries.

Q. How many vehicles are there, Mr. Robilio?

A. At the present I would say about eighteen, off hand.

Q. And do you know approximately how many the  
227 company was operating in the year 1960?

A. Approximately twenty-three.

Q. And those—would those all be delivery type trucks?

A. Yes, sir.

Q. Any over-the-road tractor-trailers?

A. No, sir.

Q. Combinations?

A. No, sir.

Q. In what area do your delivery trucks operate?

A. Well, we operate a few of those trucks within a radius of about a hundred and seventy-five miles of Memphis, delivering our own merchandise.

Q. Yes, sir. Would that include Mississippi, Arkansas, and Missouri?

A. Yes, sir.

Q. And was that true within the year 1960?

A. Yes, sir.

Q. During that year, did you buy any truck tires from Steepleton General Tire Company?

A. Yes, sir.

Q. Did you have recapping done by Steepleton?

A. Yes, sir.

Q. In your operation, did Steepleton Tire Company  
228 send a service man regularly to your terminal to look after the tire repairs and service?

A. My trucks were checked, because they were not all in the city at one time, and I requested that service.

*Testimony of John S. Robilio*

Q. Yes, sir. And how often would he have a man there without such call?

A. Well, off hand I would think they checked them once a week, or every two weeks, that is, on weekends when we had our equipment in the city.

Q. Yes. And did that checking involve the removal of tires that needed recapping and the installing or mounting of other tires on the wheels?

A. Steepleton Tire Company had orders from me if there was any equipment on any trucks that were a hazard, to remove it.

Q. Yes, sir. And his company did the recapping of your tires to be used again on your vehicles?

A. Yes, sir.

Q. All right. In your purchases of new tires for your vehicles, Mr. Robilio, would you state whether or not you were buying those tires at retail?

A. I was buying them on the fleet owner's price.

Q. Do you know whether or not that involved discounts from the retail price?

229 A. Well, I would imagine that that was a discount from the retail price because of the volume of tires we were using.

Mr. Tincher: I believe that is all.

**Cross-Examination,**

By Mr. Burch:

Q. You are a manufacturer who is on quite a large scale, are you not?

A. Sir?

Q. I say you are a manufacturer yourself, and on quite a large scale, are you?

A. Well, we are manufacturers. I don't know how large we are, or not.

Q. Well, in the spaghetti business you are big, one of the biggest in the country.

*Testimony of John S. Robilio*

Now, you properly made the distinction between a discount off of retail—discount off of retail is not necessarily wholesale, is it?

A. I would think so.

Q. You would or would not?

A. Here is one thing. I am going to take it from a car standpoint. If a guy is going to buy one car, be one price. But if he is going to buy a volume, it is my  
230 experience any company would give me a fleet owner's discount.

Q. You might say, if you know, then, the greater the customer, the greater you are going to get off. You are going to consider a customer—we will call it a boat—one boat—another boat—three of those here in the last week, going to call him a good customer, he goes into the store and is going to get ten dollars off.

That discount does not make it wholesale, does it?

A. No, not absolutely.

Q. Here is a discount off of retail, isn't it?

A. I would imagine.

Q. Actually, the more you think about it—I know you are not primed for these questions and did not come up here as an expert on this—just want you to think about it as we go along.

Isn't this what the distinction in wholesale is:

Wholesale is a person who holds for resale, sells for resale.

A. I understand, then.

Q. That is really what it is, isn't it?

A. Yes.

Q. In other words, where you get a discount off, as, for instance, if I am good user of shotgun shells  
231 and a fellow gives me fifteen cents off, that does not make me a wholesaler, or a wholesale transaction, did it?

*Testimony of John S. Robilio*

A. I wouldn't think so.

Mr. Burch: Thank you.

**Redirect Examination,**

By Mr. Tincher:

Q. Just a minute, please, sir.

A. Yes.

Q. Mr. Burch has asked you about some questions there with regard to something you might purchase at discount for your own personal use.

Now, do you understand that there are situations where you buy merchandise, not for resale, but for use, in a business where those purchases was—were wholesale purchases?

A. I didn't get that clearly.

. . . . .

232 Q. Are there any supplies or materials or equipment which you use in your manufacturing business which you do not resell, but which you purchase at wholesale prices?

A. I do not operate the plant. My job is in the shipping department only.

Q. Yes, sir. But from your part ownership in the business are you aware that certain supplies and equipment are bought at wholesale prices for use in the business?

A. Well, if you go into flour, buying at manufacturer's cost, and just like I say, I am not familiar with any part of my business that is in the production. We do not conflict in one another's jobs.

. . . . .

*Testimony of Warner Swett*

233

**WARNER SWETT,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tincher:

Q. You are Mr. Warner Swett?

A. Yes, sir.

Q. By what company are you employed?

A. With Central States Dredging Company.

Mr. Mitchell: Will you repeat it, please?

A. Central States Dredging Company.

Mr. Mitchell: Thank you.

Q. Please speak loud so that counsel can hear, and the reporter.

What position do you hold with that company, Mr. Swett.

A. I am the Office Manager and Purchasing Agent.

Q. Did you have that position in the year 1960?

A. I did.

Q. Do you know how many vehicles the Central States Dredging Company was operating in the year 1960?

A. Yes, sir, fourteen.

Q. What type of vehicles were they?

A. We had four Mack dump trucks, seven pick-up half tons, and three cars or automobiles.

234 Q. All right. In your position as Purchasing Agent, did you buy tires and recapping services for those vehicles in 1960?

A. I did.

Q. During that year did you purchase tires and recapping of tires, maintenance service, from Steepleton General Tire Company?

A. Yes.

Q. With reference to all the vehicles operated by the company?

*Testimony of Warner Swett*

A. Yes, sir.

Q. Where do those vehicles operate with reference to within the State of Tennessee or outside the State of Tennessee?

A. The four Macks operate on Government mat forms, Capes Landing, Missouri, Helena, Arkansas, and Richardson Landing, Tennessee.

The pick-ups are used in dredging—dredging out of Columbia, Kentucky, and all the various bases through Mississippi, and Helena, Arkansas, to about Island 62. The pick-ups are used to go from the dredge to the unloading operation.

Q. Do you transport gravel and other materials that have been hauled on the Mississippi River?

235 A. The Mack dump trucks do a sand and gravel operation.

Q. Do the pick-up trucks interchangeably do dredging and hauling outside the State of Tennessee?

A. For supplies and things like that, they do operate the highways of Arkansas, Mississippi, Tennessee, Missouri, and Kentucky.

Q. Did Steepleton Tire Company in 1960 provide service and send a service man to your place of business to check the tires?

A. Yes, sir.

Q. Did that service involve the removing of tires from your vehicles and installing and mounting of other tires from the vehicles?

A. Yes.

Q. As Purchasing Agent, would you explain the basis upon which you bought new tires from Steepleton Tire Company?

A. I don't know the price structure, but I imagine it would be commercial rate.

Q. Do you know from your dealings with various tire

*Testimony of A. L. Benning*

salesmen how the transactions are handled with reference to fleet owners, fleet purchasers or discounts or other terms that are applied to that type of purchase?

A. No, sir, I wouldn't know that. We have traded  
236 with Steepleton for so long that I don't know their price structure or any other tire company.

Q. Well, as Purchasing Agent, would you know whether you were buying at retail or not at retail with reference to the truck tires?

A. I think we would be buying below retail.

. . . . .

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**A. L. BENNING,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tineher:

Q. Will you state your name, please, sir?

A. A. L. Benning, B-e-n-n-i-n-g.

Q. By whom are you employed, Mr. Benning?

A. Transports, Incorporated.

Q. In what capacity?

A. A bus line.

Q. Pardon?

A. Bus line. I am Superintendent.

Q. Superintendent of Transports, Incorporated, which operates a bus line?

A. That is right.

Q. Did you have that position in the year 1960?

A. Yes, sir.

Q. Approximately how many vehicles were the Transports, Incorporated, operating in the year 1960?

A. Fourteen.

Q. Did those vehicles travel outside the State of Tennessee?



*Testimony of A. L. Benning*

A. No, sir.

238 Q. From what point to what point did they operate?

A. From Memphis to Millington, Memphis to Shelby Forest, Memphis to various places.

Q. Were all those fourteen vehicles passenger vehicles?

A. Yes, sir.

Q. In the course of operation, did you transport passengers who were going from places in Tennessee to places outside of Tennessee?

A. Now, that I couldn't tell you. We bring them in to the bus terminal, and where they go from there I don't know.

Q. During the year 1960, did you buy any truck tires from Steepleton General Tire Company?

A. We did.

Q. Would you state the approximate quantity, if you recall them, in dollar volume or number of tires, that you bought in that year?

A. Oh, I couldn't. I imagine we usually run an average of three hundred dollars a month.

Q. Are those all bus tires?

A. Yes, sir.

Q. Would you state whether or not in your purchases of bus tires in 1960 you were buying from Steepleton Tire Company at fleet discount?

A. At fleet discount.

239 Q. That was the basis on which you made your purchases?

A. Yes, sir.

Mr. Tinker: I believe that is all.

**Cross-Examination,**

By Mr. Burch:

Q. You bought none for resale, did you, Mr. Benning.

A. No, sir.

. . . . .

*Testimony of James H. Micklish*

244

**JAMES H. MICKLISH,**

upon resuming the stand, testified further, as follows:

**Redirect Examination (Further),**

By Mr. Tincher:

Q. Mr. Micklish, at the close of the day yesterday when you were on the witness stand, you had been asked by Mr. Mitchell whether you had total figures reflecting sales by Steepleton Tire Company to the City of Memphis.

Do you now have those totals?

A. Yes, sir. I did not at that time but I do now.

Q. And from what information or exhibits in the case did you arrive at the totals?

A. I have forgotten the exhibit number. It is that one indicating the sales to fleet accounts.

Q. Perhaps it would be well for you to identify the exhibit from which you took the totals.

A. Exhibit 4.

Q. All right. And what is the total of sales of new tires by Steepleton Tire Company to the City of Memphis in 1960?

A. \$9,289.00.

Q. Now, were those sales which, according to the information you have been given, were made pursuant to formal bids?

A. Yes, sir.

Q. Did you, from the transcriptions that have been  
245 identified and those that have been introduced in evidence, make a further study and break down to show that total sales of new tires by Steepleton Tire Company in the year 1960 to various other governmental units?

A. Yes, sir.

Q. Do those governmental units include various counties as well as sales to the State of Tennessee?

*Testimony of James H. Micklish*

A. Yes.

Q. All right, any other types of governmental units that have not been specifically mentioned?

A. Yes, one sale to the—one or two sales to the United States Post Office.

Q. All right. Would you give the—or state first where in your transcriptions you took the information from which you arrived at that total?

Mr. Burch: Now, is there any suggestion in the arrangement of these questions that these sales were pursuant to bid?

Q. Mr. Micklish, as far as you know, any information to indicate that they were pursuant to bid?

A. They appear in two exhibits. A part of them appear in the out-of-state exhibit, which is Exhibit number 1, due to the fact that they were out-of-state counties.

246 And the remainder of them appear in Exhibit number 4.

Q. Before we get the total with reference to those sales, what was your information as determined or as obtained from Mr. Steepleton with reference to prices charged to governmental units for their new tires bought from Steepleton?

A. That substantially all of the tires were sold on what is called a State list price which is a list that is lower—he has a list there lower than his cost of tires.

There were two or three counties which paid a little bit more, due to the fact that they received some extra service and I think delivery. But they were substantially all less than the price—the price of the tire was less than what Mr. Steepleton would pay for it.

Q. All right. Those to which services were performed for the county in connection with the sale of tires, were those explained by Mr. Steepleton as charges over and above State list price to take care of the services performed?

*Testimony of James H. Micklish*

A. Yes, sir.

Q. What was the total for the year 1960 of these sales of new tires to governmental units other than the City of Memphis?

A. \$47,159.00.

Q. Mr. Mitchell inquired of you yesterday with reference to percentages which you had prepared, total of sales made by Steepleton Tire Company in 1960 in  
247 various categories, referring to the interpretative bulletin which has been made an exhibit—Exhibit number 6.

Have you since that time prepared such percentages which would not answer the question Mr. Mitchell asked you?

A. Yes, sir, I have done it in note form, but I have made no complete sales analysis.

Q. Before we proceed with putting your analysis in evidence, do you have a figure with reference to sales made by Steepleton Tire Company in 1960 to fleet accounts at wholesale prices?

A. Yes, sir.

\* \* \* \* \*

250 Q. Do you have that figure among your notes, Mr. Micklish, or do we need a partial sales analysis?

A. No, sir, I have the figure.

The total sales which I accumulated for fleets which operated ten or more vehicles is \$110,981.00.

From—

Q. How is—go ahead.

A. (Continuing) This includes sales of truck tires and tubes, which I understand it on Steepleton's records on the accounts receivables records were listed under the heading "General truck."

I deducted ten percent from this figure to take out the sale of any tubes which might have occurred in these transactions.

*Testimony of James H. Micklish*

251 And I came up with a total figure of \$99,833.00.

Q. Does that \$99,883—

A. Eighty-three.

Q. Eight hundred eighty-three dollars?

A. Yes, sir, eight hundred eighty-three.

Q. Would you explain the basis on which you made the reduction of ten percent for truck tubes?

Did you make any examination or study of sales invoices to indicate whether that would remove any question of amounts being included on the total figure which should represent sales of truck tubes?

A. Yes, sir. In checking the invoices, there were many cases in which tubes were sold. In the majority of them that were sold in connection with prior sales and through observing of the records, it appears that ten percent will more than take care of any tubes which would appear on the invoices.

Q. Mr. Mitchell has handed you a sheet on which a breakdown appears to be made.

Will you explain what that is, now, with reference to the various totals that appear on that sheet?

A. Yes, sir. That is the categories that are—as previously testified, about listing categories and amounts involved. The first one is sales for resale. And  
252 should I read the figures?

Q. Yes, go ahead and give the figures, and we will know what you are talking about.

A. Sales for resale, \$58,395.00.

National account sales, General Tire & Rubber Company, \$115,597.00.

And I don't have the cents on each one of these.

Sales of new truck tires to fleets known to have had ten or more vehicles in 1960, \$110,981.00, with a deduction of ten percent, making that total \$99,883.00.

Sales of new truck and passenger tires to Government—and those are sales at the State list prices—\$47,159.00.

*Testimony of James H. Micklish*

Q. Could we stop just a moment.

Does that cover sales to governmental units other than the sales to the City of Memphis?

A. Yes, sir, other than the City of Memphis. City of Memphis is the next category.

Mr. Tincher: All right.

A. (Continuing) Sales to the City of Memphis, new truck and passenger tires, \$9,289.00.

And the last category is recapping to fleet accounts at less than retail, \$21,959.00, for a total of \$355,73.00.

Mr. Tincher: All right, then may we have this  
253 sheet from which the witness has been reading marked as Plaintiff's Exhibit number 7.

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 7, and same will be found among the exhibits in the cause.)

. . . . .

256 By Mr. Tincher.

Q. Mr. Micklish, from this Exhibit number 7, the figures of this exhibit, have you prepared any computations of percentages in the various categories, based upon gross sales made by Steepleton Tire Company in the year 1960?

. . . . .

258 Q. Have you prepared such percentages, Mr. Micklish?

A. Yes, sir.

Q. What figure did you use as the gross dollar volume of sales by Steepleton Tire Company in the year 1960?

A. I used the figure that was furnished by Mr. Steepleton in answer to interrogatories.

Q. Now, what figure was that, Mr. Micklish?

A. \$903,520.56.

Q. And that was furnished in answer to interrogatory number six, which was gross income from sales and service during the year 1960?

*Testimony of James H. Micklish*

A. Yes, sir.

Q. Did you use any other figure in arriving at percentages?

A. Yes.

Q. Just answer that question.

A. Yes, sir.

Q. What other figure, and from what source did you get the information that you used?

259 A. Again, it was from the—no, this was the national account figure which was furnished by the answer to the interrogatories.

Q. And what was the total figure in that answer?

A. I don't have that, sir. I have the two added, but I don't have that figure in my notes.

Mr. Mitchell: If that is Exhibit 7, the exhibit there—

Q. In response to interrogatory number eight, defendant's counsel furnished this information with reference to replacement of inventory value, plus commissions earned for delivery of new tires by defendant to national account customers of General Tire & Rubber Company by quarters during the 1960 year:

First quarter, \$28,306.16.

Second quarter, \$43,809.70.

Third quarter, \$29,490.25.

Fourth quarter, \$11,318.02.

The total of which I am adding, is \$112,924.13.

Is that last figure the one you used in arriving at percentages you had in your second percentage analysis?

A. Oh—

Q. Or did you use the national account sales of  
260 \$115,597.00 as reflected on Exhibit number 7?

A. Yes, sir, that last figure is the one I used. I was in error when I said that I used the other figure. The figure I used was \$115,597, which is the total which was reflected by their monthly totals in the accounts receivables records.

*Testimony of James H. Micklish*

Q. Is that the total that is shown by the transcriptions which you made a part of your testimony yesterday as Government exhibit?

A. Yes, sir.

Q. Now, if you will, will you state the percentage of total sales for each of the various categories?

Mr. Mitchell: Pardon me. I did not get the total for the gross dollar volume in sales.

Will you repeat it?

Q. What was the gross—total of gross dollar volume in sales by your second analysis, which included the sales and services plus the national account sales?

A. \$1,019,117.56.

Q. Now, will you take the percentages which you derived in each of the categories shown by your Exhibit number 7, and then the total percentage of all those, using first the sales and service figure of \$903,520.56 as supplied by the defendant in the interrogatories?

261 A. Sales for resale, 6.4 percent.

National account sales, 12.7 percent.

Sales to fleet accounts operating ten or more vehicles, 11.0 percent.

Sales to Government, excluding Memphis, 5.2 percent.

Sales to the City of Memphis pursuant to formal invitation to bid, 1.0 percent.

And recapping to fleets at less than the prevailing retail prices, 2.7 percent, for a total of 39 percent.

Q. Now, using the other total, which I would like for you to read again, state—including both the sales and services as the figure was supplied by the defendant in response to interrogatories, plus the national account sales—give us those percentages.

A. That total was \$1,019,117.56.

Q. Percentage of this total in sales for resale.

A. 5.7 percent.



*Testimony of James H. Micklish*

National account sales, 11.3 percent.

Sales to fleet accounts operating ten or more vehicles, 9.8 percent.

Sales to Government, 4.6 per cent.

Sales to the City of Memphis pursuant to formal invitation to bid, .9 percent.

262 Recapping to fleet accounts at less than the prevailing retail prices, 2.4 per cent, for a total of 34.7 percent.

Q. Would you, Mr. Micklish, from Exhibit 4—do you have the total showing the sales of new tires to various counties that were listed in the transcriptions on Exhibit 4?

A. Those that are listed only in Exhibit 4?

Q. Yes, do you have the totals?

A. No, sir, I have them totaled altogether, those listed in Exhibit 1 or Exhibit 4.

. . . . .

**Recross-Examination,**

By Mr. Mitchell:

Q. Mr. Micklish, with respect to that point that Mr. Tincer just last mentioned, that is, in your accumulation of some \$47,159.00 of what you call sales to governmental agencies at State list prices or something, you have extracted some of that total from what you have  
263 previously offered as your Exhibit 1, and you have extracted another part of it from Exhibit 4, is that correct?

A. Yes, sir.

Q. Now, have you made an adjustment or can you tell me what the adjustment is to your Exhibit 1? That is, by what amount is your previous total for Exhibit 1 of some \$86,850.00 reduced by this extraction of sales to government at what you say is the State list price?

A. It is not reduced, sir.

*Testimony of James H. Micklish*

Q. Well, what is the effect or what is the amount of it? That is all I want to know.

A. Well, sir, the amount I don't know. But it has no effect on Exhibit 1 because Exhibit 1 refers basically to out-of-state sales.

Q. All right, sir. I shan't ask you to change what your opinion is on it. I am sorry. I meant—but what I meant is on that schedule Exhibit 1, what part of Exhibit 7 consists of sales to states and counties someplace that are also included at least in this eighty-six thousand odd dollar figure for Exhibit 1.

A. The only way I could give you that is to go through the exhibit and pick out the counties.

\* \* \* \* \*

266 Q. Well, would you mind going through and telling me what pages, sheets, or other identification on Exhibits 1 and 4 you used in making up this total?

A. Yes, sir.

Q. I am trying to ascertain where you got that figure or how it is derived.

Would you take the red pencil or something and put a star on the pages in your Exhibit 1 and Exhibit 4 that you think are pertinent to county sales at State list prices?

(Witness marks exhibit as requested.)

Q. Now, what method are you using to mark them, so the record will reflect what you are doing?

A. On Exhibit 1 I am placing a star or asterisk beside the sales of truck and passenger tires to government units.

Q. All right. And that would be there—what you will mark—what you will mark will be the items you took out of Exhibit 1 to go into this total sales at State list price, I think you testified, of \$47,159.00?

A. Yes, sir.

Q. All right, mark them with red in pencil.

*Testimony of James H. Micklish*

Mr. Tincher: Might I suggest, as the witness goes along, that he identify which state or county or city or governmental unit he is marking.

267 Mr. Mitchell: Well, the exhibit will speak for itself, but if he wants to read it out, there is no objection.

Mr. Tincher: That is what I thought may be helpful if he will read out those, the governmental customers.

A. Drainage District number 9, Osceola, Arkansas.

Marshall County Schools, Holly Springs, Mississippi.

Mississippi County Road Department, Blytheville, Arkansas.

Quitman County District number 1, Marks, Mississippi.

Quitman County District number 2, Marks, Mississippi.

Quitman County District number 4, Marks, Mississippi.

Quitman County District number 5, Marks, Mississippi.

Tallahatchie County Highway District number 5, Jackson, Mississippi.

Tipton County Highway Department, Covington, Tennessee.

Tishomingo County District number 1, Tishomingo County District number 2.

U. S. Post Office and Garage.

Q. All right, have you done it, sir?

A. Yes, sir.

Q. All right. Now, then, can you also take your Exhibit 4 and follow the same procedure, please, sir.

As I understood your testimony, you got a part of  
268 the forty-seven thousand figure from entries in your Exhibit 1 and the balance from Exhibit 4.

A. Yes, sir.

Q. I believe Mr. Tincher wanted you to read those out, Mr. Micklish.

A. Yes, sir.

Q. You may want to do it.

*Testimony of James H. Micklish*

A. Dyer County Highway Department, Dyersburg, Tennessee.

Chester County Highway Department, Henderson, Tennessee.

Fayette County Highway Department, Somerville, Tennessee.

Gibson County Highway Department, Trenton, Tennessee.

Lauderdale County Highway Department, Ripley, Tennessee.

Obion County Equipment Garage, Union City, Tennessee.

Shelby County Board of Education, Shelby County Sheriff's Office, State of Tennessee Highway Garage, and State of Tennessee Department of Purchasing.

Weakley County Highway Department, Dresden, Tennessee.

That is all.

Q. All right. And you have also marked those with a red pencil or asterisk, or some indication to identify what particular counts out of your exhibit 4 you used in accumulation of the forty-seven thousand dollar figure of sales at State list prices?

A. Yes, sir.

269 Q. All right. Now, then, follow me. I believe I understand what you were trying to do.

Do you have your Exhibit 6 there, the January 1960 interpretative bulletin, available to you.

. . . . .

271 Q. All right, Mr. Micklish, you have that.

Now, then, please, sir, if you will turn to page 33, the very low bottom of the left column of that page, paragraph number 2 relates to sales made pursuant to a formal invitation to bid.

As I understand it, your testimony is that there is but

*Testimony of James H. Micklish*

one category of such sales that is pursuant to bid, they were made to the City of Memphis exclusively, and they total, according to your calculation, some \$9,281.00, is that correct?

A. That is the only one that I have used, yes, sir. There is a possibility that there are others, but that is the only one I have used.

Q. Yes, sir. That is pursuant to bid, and that is under paragraph 2?

A. Yes, sir.

Q. Now, then, what you have done is go through and pull county or other governmental agencies as the customers of Steepleton and set up some forty-seven thousand odd dollars of that kind of sale that you say it is based on State list prices.

272      Actually, with regard to that, you are proceeding under paragraph 4, are you not, on the connotation of probably several vehicles at some price less than the prevailing or wholesale, or whatever price is, on paragraph 4?

A. That is correct, sir. I am applying paragraph 4 to this.

Q. Now, then, what did you do about going out to the several customers whose names you read off and which you have marked now in your Exhibit 1 and your Exhibit 4, to determine how many vehicles they had, whether or not they were buying tires for them, whether he owned ten, or less than ten, or what the circumstances were about exactly how many vehicles there are, that the various counties of governmental agencies had or operated and bought tires for during '60, in order to fit the classifications that you have imposed on there for the purposes of your one entry, at least, in your Exhibit 7?

A. Nothing.

. . . . .

*Testimony of James H. Micklish*

Q. Did you or not have familiarity with whether  
273 or not recapping is done for these governmental  
customers at something different than the prevail-  
ing to anybody else recapping price?

A. No, sir.

Q. Do you know the amount of recapping or other  
services income represented by your figure of some forty-  
seven thousand dollars in sales to these customers of a  
governmental type?

A. There is no recapping included in that. That includes  
only sale of truck tires or purchase of tires.

Q. You are sure none of the figures you have indicated  
reflect any recapping and service income?

A. There was certainly recapping and service work  
performed for the county, but that figure there includes  
only the sales of truck tires and passenger new tires—  
new truck tires, new passenger tires.

Q. You got this from accounts receivable. As I under-  
stand, that is where you got the figure. That is where  
you got your entries, didn't you, your Exhibit 1 and  
probably Exhibit 4?

A. Yes.

Q. And you pulled out—took out all recapping or  
service income?

274 A. It is broken down in accounts receivable.

Q. As a matter of fact, is recapping done at any-  
thing other than prevailing prices for the customers,  
whether or not they are state, county, or governmental  
units, Mr. Micklish, by defendant Steepleton?

A. It is substantially the same, with the exceptions that  
I noted yesterday.

Q. Yes, sir. That will be the several sheets you accu-  
mulated in Exhibit 4, I believe it is, on which—is that  
not where you have accumulated what you say are recaps  
at something other than the prevailing rate?

*Testimony of James H. Micklish*

Mr. Tincher: I believe that is Exhibit 5.

Mr. Mitchell: That is Exhibit 5. Thank you for the correction.

A. Yes, sir, that is Exhibit 5.

Q. And governmental agencies do not appear as the segregated accounts in the four parts of that exhibit, do they?

A. No, sir.

Q. And recapping done for counties or school boards, or whatever else, is at prevailing or everybody else's price by Steepleton?

A. Yes, sir.

Q. All right. Actually, there is no mention made in this interpretative bulletin that you found in your  
275 preparation of this case—there is no mention made of any governmental sales except those pursuant to a formal invitation to bid?

A. I think that is the only mention of them, yes, sir.

Q. And your interpolation or your broadening of the exhibit in the course of paragraph 4 to include governmental sales is something that is not expressed in this, which is simply your adaptation or interpretation of paragraph 4.

Then when I say "you all," I obviously mean your department?

A. Yes, sir.

Q. Your immediate associates?

A. Yes, sir.

Q. In the Labor Department?

A. Yes, sir.

Q. Now, then, you have indicated with regard to the total gross sales, gross receipts of sales and services, that you used the figure of \$903,520.56, which you derived from information I informally furnished Mr. Tincher's use, however he wanted to use it, in answer to interrogatory



*Testimony of James H. Micklish*

number 8, breaking down income I imagine by counties, I am not sure.

But anyway, you got it from some information I furnished, as customary, in answer to interrogatories?

A. Yes.

276 Q. And this is what you relied on?

A. Yes.

Q. This was in lieu of whatever you found of your own knowledge on three different occasions in making audits of defendant's records and place of business?

A. Yes, sir.

Q. This was also independent of whatever you found when you went out there I believe the second, and I know the third time, and had access to their profit and loss statements for more than one period, tax returns for more than one period, and of course their entire set of accounts?

A. Yes, sir. This is the figure I used.

Q. In lieu of whatever you found, you used the figure that comes from me. But you did not use it in regard to national accounts.

Now, I want to read what I have to say in that same informal furnishing in lieu of answer to interrogatories of Mr. Tincher about national accounts:

"The defendant makes no sales to national account customers.

Replacement of inventory values, plus commissions earned for delivery of new tires by defendant to national account customers of General Tire & Rubber Company by quarters during 1960 were:

277 "First quarter—\$28,306.16.

"Second quarter—\$43,809.70.

"Third quarter—\$29,490.25.

"Fourth quarter—\$11,318.02.

"No deliveries of recapped tires were so made."

Now, is there anything, based on your three audits,



*Testimony of James H. Micklish*

that is at variance with my statement that the national account income includes both the replacement of inventory values, plus some commissions on the books of Steepleton Tire Company?

A. Sir, it is not my understanding that those are replacements of inventory value, but rather a credit on Mr. Steepleton's accounts with—

Q. All right. If you won't accept the term "replacement of inventory," in lieu of it, is it on actual observation, based on your audit, an adjustment of purchase accounts?

And I think the two are the same, but we won't argue the actual fine points with you.

I don't know that much about accounting. I think when you adjust the purchases—the purchasers account in the business from the supplier, it is the same as 278 inventory adjustment. But about that I may be wrong.

Is it correct or not correct?

A. Well, certainly Mr. Steepleton's account is adjusted when this transaction takes place, but I think it is more involved than that.

Q. I am asking whether or not this figure that you have—you haven't used my figure from the interrogatories—you did for gross sales and services but did not for national accounts, did you?

A. Yes, sir.

Q. You did not?

A. No.

Q. Did you select it from the interrogatories or select it somewhere else? Where did you get the one hundred and fifteen? Do you remember that?

A. For national account sales.

Mr. Mitchell: Yes.

A. Yes, sir, from Mr. Steepleton, the national account receivables of it.

*Testimony of James H. Micklish*

Q. You didn't on total sales, gross sales from the same location.

Why use one source on one part of the total, another source on another part of the total?

279 A. Well, because accounts receivable records certainly don't reflect all sales made by Steepleton General Tire Company, and it would——

Q. All right. In fact, they did not reflect any national accounts, did they? They are not in those records, they are not on the profit and loss statements, they are not in his tax return, are they—national accounts?

A. National account, yes, sir.

Q. National accounts?

A. The national accounts appeared in the accounts receivable ledger.

Q. I asked you about the P & L statements and his tax returns.

They have got a separate ledger he kept for memorandums purposes?

A. No, sir. These national account sales were not shown in his profit and loss statements, sir.

Q. All right. And they are kept separate in the accounts receivable, they are on them on a memorandum basis, a month to month basis, with General Tire Company. They don't go over into the profit and loss statement as such, and they don't show up on the company's tax returns as ordinary sales income?

280 A. That is correct.

Q. And I take it here the figure of some one hundred thirteen thousand dollars is because that would have come from my informal answers to interlogs, and this one hundred fifteen you used—a big part of that is actually adjustment of inventory values and adjustments to purchases accounts, is it not?

A. No, they are all national account sales.

*Testimony of James H. Micklish*

Q. Yes, sir. But national account actually is made up of two items, one is the adjustment in cost that Steepleton has in his inventory, delivered to a customer of General Tire Company, that is the bulk of it, plus commissions, maybe five, maybe seven, at variable percentage, which he gets from having this storage delivery.

To make it clear, sometimes he installs a tire on a wheel, whatever else he might do, for a general customer.

So, out of this one hundred fifteen thousand, with there being some prearranged figure, between five and seven percent, is inventory adjustment, it is not income at all, it is simply their bookkeeping entry. Is that not so?

A. Their bookkeeping.

Q. Nothing more than a bookkeeping entry, it is simply a substitution of the inventory which Mr. Steepleton has delivered to a customer of the national manufacturer.

A. Not substitution of inventory, but giving a credit.

Q. Or replacement of inventory is the way I think of it. And I think that is the clearest, and having in mind that I don't know much accounting, in the first place.

A. Actually, it appears to me that it is a sale to General Tire & Rubber Company, for resale to their customers.

Q. It appears to you that it is what, Mr. Micklish?

A. A sale to General Tire & Rubber Company, delivered by Steepleton General Tire & Rubber Company for General Tire & Rubber Company.

Q. Let's just look at that.

Do you think it would make real good sense for General Tire manufacturer, with automobile tires or truck tires running out of their ears, to send one of those trucks here to Steepleton that is a retailer in order to buy a General from him

A. No, sir, but it is——

Q. Be logical——?

*Testimony of James H. Micklish*

A. (Continuing) It is an accommodation to their customer, I would think.

Q. Yes, but the customer is General Tire Company's customer. And the accommodation is done to the  
282 customer of the home office of General Tire Company. And if you call it a national account, it is as to that category of customer.

A. Yes.

Q. And the accommodation rendered is from services by Steepleton, and he gets a commission for those services, and he also gets his inventory replaced—right? Or he gets credit against his purchase account?

A. Yes.

Q. And both inventory replacement or service income is included in that one hundred fifteen thousand dollars?

A. Yes, sir.

Q. It is also included in the one hundred thirteen which you did not choose to use?

A. Yes, sir.

Q. Now, you have come down and you have given some lists of sales, gross sales, percentage of sales.

And actually, do these—or what adjustment did you make for the federal and state sales tax on these sales?

A. None.

Q. You know the federal tax over the board runs ten percent on capping tires, and of course a three percent sales tax?

A. I don't know. I say what the percentage is on excise tax.

283 Q. Did you have recollection of becoming acquainted with a ten percent figure by reason of repeated examination of defendant's records?

A. No, sir.

Q. I am not sure about this, but I believe on page 33 of the interpretative bulletin that somewhere in there

*Testimony of James H. Micklish*

there is a specific deduction to use there about sales— to make exclusions after getting the taxes structure.

I believe that is in there. I will ask whether or not it is. I am sure you are more familiar with it than I.

A. No, sir, as far as I know, it is not.

Q. You don't exclude federal excise taxes?

A. No.

Q. You don't exclude sales taxes, even though they are paid by the company?

A. No. I know of nothing in seven seventy-nine—

Mr. Mitchell: I won't take too much time, Mr. Burch.

Now, then, tell me on one of your figures which you have categorized as sales to fleet accounts, did you use wholesale—the first sheet, total dollar volume of sales—sales of new truck tires to fleets known to have 284 ten or more vehicles in 1960, and come up with the net figure of approximately \$99,800.00.

Now, those known to have ten or more vehicles is again based on your surmise or your own conversation you had with somebody, it is not based on observation, going out physically and counting or anything, or your personal investigation of the number of vehicles operated by the owners that you say operated more than ten.

A. That is correct, sir, with the exception of those who have testified.

Q. That is what I say. So I want to know how and where did you have that accumulation in this exhibit, that is, this number three, items on that exhibit you have, where is the backing supporting data for that figure?

A. I don't understand you.

Q. Let me pass this exhibit up.

I am referring to item three. And I want to know where the supporting data, in other words, the sub-totals shown on that, may be?

A. Oh.

*Testimony of James H. Micklish*

Q. Do you understand what I asked you?

285 A. The figures from which these figures were taken appear in Exhibit 1 and Exhibit 4.

Q. All right, sir. Again, have you got those broken down?

A. I have a list of those.

Q. Fine. May I see it?

A. Yes, sir.

Q. Now, this sheet of paper you have handed me is your entry, is it not?

A. Yes, sir.

Q. It says fleet accounts, ten or more vehicles.

And do I understand that if we go through this Exhibit 4 and take the totals under the accounts, the names of which appear on this sheet that I now hold, we will end up with total sales of \$110,981.00?

A. No, you have to go through Exhibit 4 and 1.

Mr. Mitchell: All right, sir.

A. (Continuing) Because there again it relates to out-of-state sales.

Mr. Mitchell: All right.

A. (Continuing) Your fleet accounts which were outside the State of Tennessee appear in Exhibit 1, rather than Exhibit 4.

Q. All right. So, instead of just going through  
286 Exhibit 1, we go down Exhibits 1 and 4 that are already in evidence and pull the sheets of those exhibits that have these actual titles as headings, then we will end with \$110,981.00?

A. If you add up the columns headed "general truck" and "other brands"—G. T. and O. B.

Q. You are just taking the totals of the page?

A. Each page—each column is totaled at the end of each page.

Q. You are taking page totals?

*Testimony of James H. Micklish*

A. Well, one page, it is——

Q. What particular column do I have to take there, now?

A. Because that is referring to truck tires, not referring to recaps, used tires, or labor.

Q. Fine. Will you, how ever you can make that explanation—look up here at the very top of this thing and let's see if I may help you with it—list the account.

A. You want me to write those down?

Q. If you would. If it is not accurate, as I detect it——

A. All right.

Q. If not, you correct me.

List the accounts from Exhibits 1 and 4——

A. All right, sir.

Q. (Continuing) ——the making of that total,  
287 \$110,981.00 in sales of—now, to substantiate new truck tires, or whatever else it is that consists of sales of some account, some product, during 1960 again.

Now, would you read it back to me, then?

A. Listing of accounts from Exhibit 1 and 4, total \$110,981, from sales of truck tires during '60——

Q. Thank you. Will you pass that to Miss Till and have it marked as Exhibit 8.

(Thereupon said document was accordingly marked as Defendant's Exhibit 8.)

Mr. Tinch: I understood that would be marked Defendant's Exhibit A, rather than 8.

Mr. Mitchell: Yes, I mean——

(Thereupon said document was accordingly marked Defendant's Exhibit A, and same will be found among the exhibits in the cause.)

Q. Now, then, some of these companies that are shown on this which has now been made Exhibit A to your testimony have already had representatives come in here and testify as to the number of vehicles during 1960.

*Testimony of James H. Micklish*

Have you any knowledge or can you tell me what the total sales to those companies may have been out of the total of one hundred ten-odd thousand dollars represented by all the accounts on this page?

A. No, sir.

Q. But I am correct in thinking I could get by going—for example, there has been somebody in from the Central States Dredging Company—going to either exhibit 1 or 4 in your exhibits and finding the account of Central States Dredging Company, and then taking the number of truck tires and determine by those—those representatively—for each witness the Government has called—from looking at the records of the customers, find out what part of the one hundred ten thousand dollars each customer in fact bought?

A. Yes, sir.

Q. Now, then, Mr. Micklish, I hand you what was originally Exhibit 12 in taking the second part of your deposition in this case, and I would like for you to either by reading it to be certain of it or from recollection, tell me what it is and what is there accumulated.

A. They are individual transactions to various customers.

Q. Any particular kind of transaction, sir?

A. These are indicating new—sale of new truck tires. They were taken for comparison purposes.

Q. And for what purpose had you originally prepared that which was known as Exhibit 12 to your deposition?

289 A. I intended to compare these prices with the prices charged the more repetitive and larger customers.

Q. Well, of the first few sheets of that exhibit containing listings that you made from the invoices alone as when you prepared that, were you looking at or were invoices alone available to you?



*Testimony of James H. Micklish*

A. Yes, sir.

Q. So that when you prepared that exhibit you now hold, certainly the first few sheets of it, what you were doing was running down invoices and trying to establish which customers—that bought repeatedly and in larger quantity—were buying at some discount of better prices?

A. Yes, sir.

Q. From the tabulation—well, did those first few sheets refer to sales of products and sales of services such as recapping, retreading, and others?

A. These are new tires.

Q. New tires?

A. Yes, sir.

Q. Now, then, after that exhibit had been prepared, showing a lot of work at defendant's place of business, did you get into accounts receivable records more completely, rather than simply the invoices, and determined that some of the customers you had selected and whose names and accounts appear on that list were in fact not of the category you originally had thought, that is, that they were not in fact repetitive or larger volume purchasers from Steepleton?

A. Yes, sir. But that is tabulation actually from the invoices and at the time I did not have access to the receivables records.

Q. Yes, sir. Nevertheless, you determined that based on the invoices, and that is all you had gone through at the time you prepared the sheet?

A. I was comparing the price there. I was making a list by invoices on this thing. I was looking at the customer and looking at the price.

Q. All right. You may recall that in taking the deposition you went through and circled the invoice numbers there, and a lot of these names that are listed on those first several sheets of the exhibit—the data made by you

*Testimony of Milo J. Albonetti*

to indicate names of customers, they were in fact later determined not to be repetitive customers in substantial volume of products from defendant Steepleton.

A. Yes, sir.

Mr. Mitchell: Will you make that Exhibit B?

. . . . .

292

**MILO J. ALBONETTI,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tinch:

Q. Will you state your name, please, sir?

A. Milo J. Albonetti.

Q. By whom are you employed, Mr. Albonetti?

A. A. S. Barbaro, Incorporated.

Q. And what business is A. S. Barbaro, Incorporated, engaged in?

A. Wholesale beer distributor.

Q. Here in the City of Memphis?

A. Yes, sir.

Q. What is your position with the company?

A. Secretary.

Q. In that position, are you acquainted with the type of delivery vehicles that are operated by A. S. Barbaro?

A. That is right, yes sir.

Q. Do you know—or tell us what type you have in operation and had in operation during the year 1960.

A. Well, we have the two ton trucks, closed body. And we had two transport trucks that pick up beer at Belleville, Illinois, and bring it to our warehouse.

293 Q. Yes, sir. Two over-the-road transports?

A. Yes, sir.

Q. And how many of the two ton delivery type trucks did your company operate in 1960?

*Testimony of Mjlo J. Albonetti*

A. That is nine. And we had the station wagons—the advertising wagons—seven.

Q. Seven station wagons?

A. Yes, sir.

Q. Nine delivery—two ton delivery trucks?

A. Yes, sir.

Q. Plus two over-the-road trucks?

A. Yes. I have listed here I think seventeen trucks. But I know we had two over-the-road trucks at that time.

Q. Yes, sir. Then, were all those which you have described used in the operation of the business in 1960?

A. Yes, sir.

Q. Could you give us the total again of all types that you have described?

A. That would be eighteen.

Q. All right. Do any of those other than the two over-the-road transports regularly go to points outside of Tennessee, or are they strictly within the state?

A. No, sir, only in Memphis or Shelby County.

294 Q. All right. Did your company purchase tires and recapping service from Steepleton General Tire Company in 1960?

A. Yes, sir.

Q. Did the Steepleton send a service man to your place of business on a regular basis in that year?

A. Yes, sir.

Q. How often would he come?

A. They service the trucks once a week, only on special calls for punctures and other things.

Q. Would the servicing of the trucks once a week include those two over-the-road transport trucks?

A. Yes, sir.

Q. Did your company have recapping done on such tires—of the tires that were used on the over-the-road transport?

*Testimony of B. E. Moody*

A. Possibly. We are kind of particular about our over-the-road trucks, and I think maybe once or twice we tried.

Q. But would it be true that as a general rule you would buy new tires for those trucks?

A. Yes, sir.

Q. In buying new tires from Steepleton Tire Company, would you state whether or not your company bought at retail prices or at some other prices?

A. No, we got a fleet discount.

295 Q. Would that be for trucks as well as the station wagons?

A. All trucks and station wagons.

. . . . .

296

**B. E. MOODY,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tinch:

Q. Will you state your name, please?

A. Ernest Moody.

Q. What company are you employed by, Mr. Moody?

A. Garrison Redi-Mix.

Q. Where is that company located?

297 A. West Memphis.

Q. What is your position with the company?

A. Plant Superintendent.

Q. Was your company in 1960 a customer of Steepleton General Tire Company for tires or recapping?

A. Well, I am sure it was. I can answer it for the last quarter. I was only there the last four months of 1960.

Q. All right. Do you know how many vehicles your company was operating in 1960?

A. Oh, approximately twenty.

*Proceedings*

Mr. Burch: If Your Honor please, I think we can greatly shorten this.

If all these witnesses that have been subpoenaed by the Government will stand up and be identified, I think we can stipulate as to what they will testify to.

. . . . .

298 Mr. Burch: Just call all their names there.

Mr. Tinch: Mr. Moody, who is on the stand testified he is from Read-Mix—

Mr. Burch: Mr. Moody, how many vehicles do you operate?

A. Twenty.

Mr. Tinch: Yes.

(Witness excused)

The Court: All right, who is next?

Mr. Tinch: Mr. Walter Pitts.

Mr. Pitts: Walter Pitts Truck Company.

Mr. Burch: How many vehicles?

Mr. Pitts: About fifteen tractors, thirty trailers.

Mr. Burch: All right, another.

299 Mr. Tinch: William Millwood, Chapman Chemical Company.

Mr. Burch: How many vehicles?

Mr. Millwood. About twelve.

Mr. Burch: Thank you.

Mr. Tinch: C. E. Griffith of Gordons Transport Company.

Mr. Burch: I know he has got a lot of them.

Mr. Griffith: About one thousand.

Mr. Ray: That is out of Memphis, that is one thousand?

Mr. Griffith: Yes.

Mr. Tinch: Mr. C. C. Congdon of Weymouth Construction Company.

Mr. Burch: I know about that.

Mr. Tinch: One hundred and twenty-five, I take it?

*Proceedings*

Mr. Burch: He has got a lot.

Mr. Congdon: Yes, sir.

Mr. Tincher: Harry Engelberg of Engelberg Packing Company.

Mr. Burch: How many, Mr. Engelberg?

Mr. Engelberg: Eleven.

300 Mr. Burch: Eleven.

Mr. Tincher: Irene Manus.

Mrs. Manus: Yes, sir.

Mr. Tincher: Of Ray E. Carter.

Mrs. Manus: Ray Carter Heavy Hauling. We have about eighteen tractors and twenty trailers.

Mr. Burch: Who is that?

Mr. Bevel: Billy Bevel.

Mr. Burch: How many do you have?

Mr. Bevel: Eight.

Mr. Ray: Wait just a minute. Are you counting trucks, all trucks of the company, now?

Mr. Burch: Who is this?

Mr. Bevel: Billy Bevel.

Mr. Tincher: Your name——?

Mr. Hall: Hall, twenty-eight dump trucks, three stake bodies, four trailers, twelve motor graders, one car.

Mr. Burch: And did you buy tires for your graders from Steepleton?

Mr. Hall: Buy tires—trucks—I buy all tires, sir.

301 Steepleton bought our tire rebuilding work.

Mr. Tincher: Would you state your name?

Mr. Hall: Paul Hall, sir.

Mr. Tincher: Where are you from? What is your occupation?

Mr. Hall: Gibson County Highway Department at Trenton, Tennessee.

The Court: Now, is there anybody in the group that bought tires for resale or did you all buy them for use, or buy recaps on your vehicles?

*Proceedings*

Anybody buy them for resale?

(No answer)

Mr. Burch: Now, if Your Honor please, we will stipulate that each of these operators during the year 1960, with the exception of the two individuals whose names Miss Miriam has, purchased an amount of tires and servicing—

Mr. Tincher: We asked the same questions. He testified there—is the only one—

Mr. Burch: Well, who do you think should fairly be excluded?

Mr. Tincher: Only one.

302 The Court: Mr. Bevel said he had eight vehicles.

Mr. Burch: This other gentleman, Mr. Hall, did not have commercial vehicles. He had motor graders—

Mr. Tincher: The Gibson County Highway—

Mr. Burch: Mr. Hall, how many?

Mr. Hall: There are twelve motor graders.

Mr. Burch: How many trucks and automobiles?

Mr. Hall: One car, twenty-eight dump trucks, three pick-ups.

Mr. Burch: He is all right. He should not be excluded.

That all of them purchased tires or recaps, and their testimony would be substantially the same as the witnesses who testified this morning.

Now, there is only one witness I would like to interrogate, and that is the representative of Gordons. And there was one point I would like to ask him.

The Court: All right, do you want to read these names in there?

303 Mr. Burch: They are stipulated.

. . . . .

305 The Court: Do you want to get these names in the record or not?

*Testimony of C. E. Griffith*

Mr. Ray: After Exhibit 4 is put in, we won't need all the detailed names, will we?

No, we won't need that. I think it would just clutter up the record, if Your Honor please, unless Mr. Burch wants the names that are in the record in Exhibit 4 named, the names in this further—I don't believe——

The Court: Well, you are stipulating, then, the representatives from those companies are here or are available, and all these could—would testify substantially as the other witnesses, to the same facts and circumstances.

Mr. Ray: I assume that is right, each one.

Mr. Burch: Your Honor has stated it exactly as I said it a while ago.

306 The Court: All right.

Mr. Tinscher: And that Exhibit 4 may now be received in evidence for whatever it is worth.

Mr. Burch: Well, I will stipulate that, for whatever it is worth. It may be received in evidence, yes.

. . . . .

307

**C. E. GRIFFITH,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Burch:

Q. State your name, sir.

A. C. E. Griffith.

Q. Mr. Griffith, what is your connection with Gordons Transports?

A. Superintendent of drivers.

Q. For the record, Gordons Transports is one of the biggest trucking firms in this area, is it not?

A. That is right.

Q. And you have stated already, before you were sworn, that you operate about one thousand vehicles?



*Testimony of C. E. Griffith*

A. Through Memphis, yes.

Q. Now, the cost of a tire is a tremendous item in your business, isn't it?

A. That is right.

. . . . .

309 Q. Now, what are the considerations that cause you to buy tires from wherever you buy them?

A. Price is a big factor, competitive.

See, we buy nylon tires, rayon tires, other tires. And some tires we prefer to use on the front wheels of our equipment because it handles better—whatever kind of tires that are needed for your equipment.

Q. And all those various factors are things that influence your decision as to where to purchase tires from time to time?

A. Yes, sir.

. . . . .

310 **Cross-Examination,**

By Mr. Tincher:

. . . . .

311 Q. All right. Now, in addition to what you termed reciprocity in the matter of your purchases of tires from different tire dealers, does the question of the discount which you get enter into your decision of whether to purchase the tires or not?

A. You are talking about discounts. I don't know, as far as the discount is concerned, I haven't heard that word used quite a while.

312 Q. What term is used in connection with fleet purchases of new tires?

A. It is—I don't know what they call it now. But when we go to buy tires, usually if we are going to buy off of five different companies, I get prices from five different companies, and they all vary a little bit from

*Testimony of C. E. Griffith*

time to time. And they would vary also on the type of tires you buy, whether you buy tires—half-tread or one hundred high level tires.

Q. Generally speaking, does Gordons Transports buy from the manufacturer rather than from dealers?

A. No, always gone through dealers.

Q. But do you know whether or not Gordons Transports has an arrangement with the manufacturer whereby they are billed from the General Tire Company or Firestone Tire Company home office rather than from the dealer's office?

A. No, General Tire is billed through Steepleton. Firestone is billed through Third and Washington.

Q. Here in Memphis?

A. Yes, sir.

Q. Well, my question that I still am trying to get an answer to, and perhaps I should be clear about, is:

Does your company in purchasing tires from Steepleton Tire Company or some other tire companies get  
313 what is known in the trade as fleet discount prices?

Mr. Burch: If Your Honor please, he did get the answer. He just didn't like the answer.

He stated that for many years he hadn't seen anything about discounts, that he bought at prices—stated clearly that in the record.

The Court: Well, he has a right to interrogate him further about it, if that is the point.

Mr. Burch: If Your Honor please, I am not objecting to his further interrogation. But I do object to him telling the witness he did not answer the question, when he did answer the question.

The Court: Well, he did not answer directly, I don't believe.

He did have some explanation there.

Put it to him again and see if you get a direct answer.

*Testimony of C. E. Griffith*

He of course has the right to explain his answer.

Mr. Tincher: Yes, sir.

Q. State whether or not in your purchase of tires from Steepleton General Tire Company, Gordons Transport were given what is known in the trade as a fleet  
314 discount price, or something comparable to that.

A. That word has been kicked around a lot. Now, I don't have a price list of Steepleton's, Firestone, or any other tire company. I don't have the price list that they put out. I don't have a price list from them. I ask them what I can buy a certain type tire for, what it will cost me. And I will ask three or four different companies on the type that I want. And then it has got to be pretty competitive before I place an order.

Q. Would you buy tires at the retail price to be used on Gordons Transports trucks?

A. At the retail price?

Mr. Tincher: Yes, sir.

A. I have no price—wouldn't even know what the retail price of the tire was, so far as the retail price is concerned.

Q. Well, would you say you buy the tires at something other than the retail price?

A. We buy the tires and use them ourselves. They are bought on a price based on competitive, is all that I can tell you. I don't know of any other way to explain it.

Mr. Tincher: That is all.

315

**Redirect Examination,**

By Mr. Burch:

Q. Mr. Griffith, it has been a very long time ago since people tried to sell you tires by saying, "Now, here, here is the tire at your posted price and I am going to give you a discount off that price"—that has been a long time since anybody has tried to sell you tires on that basis, hasn't it?

*Testimony of James H. Micklish*

A. Quite a few years, yes, sir.

Q. Now they come to you and say, "Mr. Griffith, here is such and such a tire, and the price to you is so much"?

A. That's right.

Q. And you buy on that price without any discount off or anything, and you look at the fellow's price against the price that you could buy it somewhere else?

A. That is right, competitive.

. . . . .

316                    **JAMES H. MICKLISH,**  
testified further as follows:

. . . . .

326                    **Redirect Examination,**

By Mr. Tincher:

Q. I hand you, Mr. Micklish, a set of sheets which contain the answers to interrogatories that were propounded by the plaintiff.

Are those the answers from which you took certain figures in your testimony this morning?

Mr. Mitchell: What is it you are handing him?

Mr. Tincher: Your answers to interrogatories.

Mr. Mitchell: Oh.

A. Yes, sir.

Q. And those are the answers which Mr. Mitchell, counsel for the defendant, said had been furnished to the Government attorney, for whatever use he wanted to make of them?

A. Yes, sir.

Mr. Tincher: I wish to offer those in evidence as Plaintiff's Exhibit number 8.

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 8, and same will be found among the exhibits in the cause.)

*Testimony of James H. Micklish*

Q. I hand you Plaintiff's Exhibit number 1, and as I recall your testimony earlier today, you read off the names of certain county government purchasers from  
327 Exhibit number 1. You called the name of some county in Tennessee. Is that correct?

Will you look through and see whether that is correct?

A. From this exhibit sheet——?

Mr. Tinch: Yes.

A. From Exhibit number 1?

Q. Exhibit number 1. It is near the back, if I recall correctly.

To speed things up, following Mr. Burch's suggestion, what I have in mind is: Are there some sheets in that Exhibit number 1 which contain entries reflecting sales to more than one customer on the same sheet?

A. Yes, sir, they are, in an attempt to conserve space. And they I put several entries on one sheet. And in this Exhibit there will appear some companies or possibly some counties in the State of Tennessee. Those were certainly not taken into consideration in computing the amount of out-of-state business.

Q. All right. That was to be my question.

Then, if customers with addresses in the State of Tennessee are included among the sheets in that folder, were the amounts of sales to such customers omitted when you compiled your total of out-of-state sales to this company?

328 A. Yes, sir. In the last pages of the exhibit, excluding these monthly lists, only those underlined in red were included in determining the out-of-state totals.

Q. All right. Now Mr. Mitchell asked you to testify, and there I believe while you were on the witness stand, and marked with a red pencil entries that show those customers whom you considered in your tabulation.

If you inadvertently overlooked any of those and do

*Testimony of James H. Micklish*

not have them marked for a customer in the category you were asked to mark, can they be otherwise identified on further examination of these two exhibits?

A. They have been identified by the name and address, yes, sir.

Q. Would that be some identification identifying the county or city governmental unit?

A. Yes, sir.

Q. Those transcription sheets have various symbols indicated, such as F. I., G. P., V. V., O. B., and perhaps others.

Where did those symbols come from, Mr. Micklish, in your preparation of these transcripts?

A. From the accounts receivable record. Those are the abbreviations used by the company.

328a Q. Did any official of the company explain to you what those abbreviations mean?

A. Yes, I think probably Mrs. Lauderdale did. At least, someone down there did.

Q. Now, try to recall, if you can, who it was and the circumstances under which the explanation was made, so that we will know whether you have correct information or not.

A. I am sure it came from Mrs. Lauderdale.

Q. Will you explain what these symbols mean, those that I called off that are on your transcription.

A. G. T. is the abbreviation for general truck or general truck tire; G. P. for general passenger; V. V. for vulcanizing, including recap; U. T. for used tire; and O. B. for other brands.

Q. Did you find any particular brand included that was identified by name under the other brands symbol?

A. Yes, sir, they sell Michelin tires under the O. B. entry.

Q. Mr. Mitchell inquired at some length about ledger

*Testimony of James H. Micklish*

entries which you examined and transcribed with reference to the General Tire & Rubber Company transactions.

And I am handing you here a number of ledger sheets, and ask you whether those are ledger sheets which you examined in that respect.

329 A. They are.

Q. Do those sheets include all the ledger sheets for the year 1960 which were carried in the account of General Tire & Rubber Company?

A. In making examination—from making examination, it appears that this is all of them, yes, sir.

Q. Now, I wish to hand you here a number of other ledger cards which were pulled at random by Mrs. Lauderdale from Steepleton General Tire Company accounts receivable ledger, and ask you whether those represent sales as reflected by such ledger records for other customers of Steepleton Tire Company.

A. They do.

Q. Were the two groups of ledger cards filed in the same filing cabinet at the Steepleton Tire Company's place of business?

A. Yes, those of General Tire & Rubber Company were filed alphabetically with the rest of the cards, with all the other cards.

Mr. Tincher: Excuse me one moment.

(Counsel confer.)

Mr. Tincher: If Your Honor please, for the purpose of proof of the matter of the composition of the two  
330 sets of ledger cards, we wish to offer them as evidence, with the understanding that defendants may substitute photostats of these.

And first, I will ask that the ledger sheets there for General Tire & Rubber Company be marked for identification as Plaintiff's Exhibit number 9.

(Thereupon said documents were accordingly marked

*Testimony of James H. Micklish*

as Plaintiff's Exhibit 9, and same will be found among the exhibits in the cause.)

Mr. Tincher: Would you count the number of sheets, please?

(The sheets referred to were thereupon counted by the reporter.)

Mr. Tincher: The reporter has counted the number of sheets in Plaintiff's Exhibit number 9.

There are thirteen sheets from the ledger for General Tire & Rubber Company.

And we offer that as Plaintiff's Exhibit number 9.

The Court: All right, sir.

Mr. Tincher: And as Plaintiff's Exhibit number 10, a random selection of ledger cards totaling nine  
331 in number for other customers of Steepleton Tire Company.

(Thereupon said documents were accordingly marked as Plaintiff's Exhibit 10, and same will be filed among the exhibits in the cause.)

Mr. Mitchell: What is that?

Mr. Tincher: Number 10 was nine ledger sheets, samples of other customers ledger cards.

Q. With reference to the General Tire & Rubber Company account, Mr. Mitchell asked you whether the account was adjusted with reference to Steepleton Tire Company's delivery of tires to various national account customers of Steepleton Tire Company.

Could you explain in what way the account was adjusted?

A. The only thing I saw concerning national accounts that—as far as I can recall—were account receivable ledger and invoice, and I did see the invoices of Steepleton General Tire from General Tire & Rubber Company, as they do in every national account transaction. I did not see any other records. Well, I did not see any of the



*Testimony of James H. Micklish*

other records connected with the transaction. But on the accounts receivable records each month the account was credited up. How it was done, of course I don't know.

I did not see any documents explaining what or  
332 how it was done.

Q. In brief, was the Steepleton Tire Company purchase account from General Tire & Rubber Company credited each month with the amount—the total amount of invoices made out during the month to General Tire & Rubber Company?

A. That is my understanding, sir, although I did not see a document showing that.

Q. Mr. Mitchell asked you whether you included federal excise and state sales taxes in the total dollar volume of sales.

Were those items, namely, federal excise tax and state sales tax, included in the accounts receivable ledger entries made by Steepleton Tire Company?

A. Yes, sir.

. . . . .

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**Recross-Examination,**

By Mr. Mitchell:

Q. With respect to these ledger accounts, Mr. Micklish, you have just identified that came in from the defendant's records, I hand you a set of ledger accounts headed General Tire & Rubber Company, named your exhibit 9, and I ask you whether or not the names of particular customers that appear written there in pen and ink or pencil down about the third column of those ledger sheets—it may be the fourth, but anyway, near the right hand—identifies and is one of the only places in the defendant's books where the customer of General Tire Company who took delivery of the units reflected at those same places on those invoices is shown.

*Testimony of James H. Micklish*

A. A customer is shown, yes, sir.

Q. And that customer's name indicates that they took delivery of whatever is written on the ledger at that place, and on the same date, is that not so?

A. It indicates that they were billed for that, or that the transaction took place. It does not show where they received the merchandise—took delivery of the merchandise.

Q. But it shows the transaction which was billed to General Tire Company on that ledger account took place with some customer there whose name is written opposite each item?

337 A. Yes, sir.

Q. And that is about the only place in defendant's records that the person or company that took delivery of the merchandise is shown?

A. Yes, sir.

Q. And that is different from every other ledger card in this sample which you have made Exhibit 10, or any other ledger card you saw at Steepleton General Tire Company—this puts it there, the different customers name for each item?

A. The others show no customers other than they are written at the top of the ledger card.

Q. The only other thing upon any other ledger card appears the same place, General Tire & Rubber Company—is that at the top of that, that is the top of your Exhibit 9?

A. Sir?

Q. The only thing—the only thing that appears at the top in the place that General Tire & Rubber Company appears on your Exhibit 9?

A. Yes, sir, other than the customers' names, the ledgers are substantially the same.

Q. Now, then, there was some question asked with regard to sales tax or this federal excise tax.

*Testimony of James H. Micklish*

338 There is no federal excise tax or sales tax reflected in this tape with all transactions of Steepleton's books, is it? I don't mean to call on your memory.

A. I don't know.

Q. But you really don't know.

Is it in point of fact that he does not know the price at which the customers whose names are written in pen and ink on that Exhibit 9—that Steepleton does not know the price which that customer from General Tire Company obtained the merchandise shown on that ledger card?

A. Yes, sir, that is true.

Q. Now, he does not know it.

And of course, federal excise tax and state sales tax is based on the percentage of the value of the item sold, isn't it? Three percent State of Tennessee, and some—about ten percent for the federal excise tax, that is true, isn't it?

A. That is true.

Q. So, if he does not know one hundred percent, they could not possibly show any ten percent or any three percent, they simply don't know the information.

A. As I understand, the excise tax is not based on the price tax—the cost tax—but the amount of rubber in it.

339 Q. It is not based on a percentage of what the tires cost somebody?

A. No, as I understand it, it is based on the amount of rubber in the tire.

Q. All right. Could they impose sales tax, and we don't have the basic value at which the ultimate consumer got the product, which is three percent of a sale that is Tennessee sales tax?

A. No, sir.

Q. So that they could not have done so and they don't have the amount?

*Testimony of James H. Micklish*

A. I think not.

Q. But Steepleton you know for a fact does not know the price at which any one of the customers actually paid for the tires shown on there.

A. That is right. That is right.

Mr. Mitchell: That is all, may it please the Court.

**Redirect Examination,**

By Mr. Tinchler:

Q. Your answer to Mr. Mitchell referred to the information which was written out by Steepleton Tire Company to show delivery of tires to one of the national 340 account customers, is that correct?

A. Yes.

Q. Where the amount of that transaction was not shown in dollars and cents?

A. As I understand it, he was referring to the transaction with General Tire & Rubber Company.

Q. Then, as I take it, you understand—would you look at this transcription from the General Tire & Rubber Company invoice and see what you need to clarify the answer.

A. This is a transcript of one of the invoices I made, invoiced to General Tire & Rubber Company. I picked it up as being more or less typical of a national account transaction. The sales tax does not show on the invoice, but the excise tax is shown.

Q. Is there an entry there that relates to the three percent?

A. Yes, there is.

Q. Can you tell whether that is state sales tax or some other item which by coincidence was—by coincidence or otherwise was the same percentage as the state sales tax?

A. No. Actually, it is labeled S. A. The S—less three percent—S. A. I don't know what S. A. stands for.

*Testimony of A. E. Steepleton*

Q. Look on this companion invoice relating to that  
341 transaction, which I understand is to reflect the  
delivery of tires to Tri-State Mack Distributing  
Company, a companion invoice, and see whether that has  
the information with regard to the price of the merchan-  
dise delivered.

A. There is no price at all on the companion invoice.

Q. Has that been the type invoice you had in mind in  
answering Mr. Mitchell's questions with respect to not  
showing sales prices of the items delivered?

A. I understood that he was speaking of the price to  
the customer. If he was talking about something else,  
then I misunderstood him, if he was talking about the  
invoice to General Tire & Rubber Company, because cer-  
tainly the price does appear on that.

Q. All right. And you have those sample transcriptions  
as a part of the Plaintiff's Exhibit number 3, which is  
already in evidence?

A. Yes.

. . . . .

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**DEFENDANT'S PROOF.**

Thereupon the defendants, in support of the issues on  
their part, introduced evidence as follows:

**A. E. STEEPLETON,**

called as a witness in behalf of the defendants, and having  
previously been duly sworn, testified as follows:

**Direct Examination,**

By Mr. Burch:

Q. Mr. Steepleton, you have previously testified after  
being called by the Government, and I don't want to  
retrack what we went over there, but I do wish you to  
state rapidly and in a summary fashion what your experi-  
ence in the tire business has been.

*Testimony of A. E. Steepleton*

A. My first indoctrination in the tire business was with McDowell Tire Company as a commercial retail salesman in Kansas City in 1938.

In 1940 I transferred my employment from them to the General Tire & Rubber Company as a wholesale territory salesman.

And in 1944 I was sent to Memphis to manage the old Newsum Tire Company, which was at that time solely owned by General Tire & Rubber Company. They gave me the opportunity to buy stock in this company  
351 out of profits earned and made me a contract that if I could operate it on a profitable basis that I could buy all the stock, which I subsequently acquired.

Q. You have been in the business since?

A. I have been in the business since.

Q. So your experience extends from 1938 over a considerable period or over a considerable area, and starting with the company level and down to the level where you are principally in merchandising, is that not right?

A. That is right.

Q. Now state whether or not in your particular business the type and quality of service that is rendered has anything to do whatever with the success or failure of your business.

I will have to ask you a lot of that type of question.

A. Yes.

Q. You will just have to be patient.

A. Well, we have approached this tire business on an entirely different angle from the average tire dealer, and specifically our competitors in Memphis. We have always believed that we can collect a little more money for a better product that is highly serviced.

Peculiar to the tire industry, a tire is one commodity that—particularly in the truck tire, we feel that  
352 needs constant servicing from the time it is put on the wheel until it is discarded as junk. And

*Testimony of A. E. Steepleton*

we have set out to render this type of service. But we were the first people in Memphis to equip a truck with air compressors, first to equip it with pneumatic wrenches. We have on our service vehicles there all new innovations that have been advanced to properly service this truck tire. So——

Q. Now——

A. (Continuing) ——in addition to that, radio to help expedite the service.

Q. When you use the word “service” that embraces service to the people who use the products, does it, principally?

A. Yes, sir.

Q. According to the testimony in this case, your customers, many of them are truck operators that operate for themselves all around the clock, every day, day and night, Sundays, holidays or Christmas, don't they?

A. Yes, sir. Our business necessarily requires that we are open approximately twelve hours a day through the regular week days, and then we are also obligated to render emergency services at night, Sundays, holidays, around the clock.

Q. And does that require not only that you render the service when it is called for, but you have a force  
353 standing ready and willing to perhaps render it when it is called for.

A. That is right.

Q. Now, what was the result of your operations in your last fiscal year profit-wise?

A. The last year you are speaking of?

Q. Well, '60, if you happen to recall it. I am just turning to see——

A. Well, since the plaintiff subpoenaed out 1960 operating statement, I just looked at it this morning, and we had a net profit of twenty-four thousand dollars.



*Testimony of A. E. Steepleton*

Q. Twenty-four thousand dollars after taxes?

A. Yes, sir.

Q. Now, if you voluntarily bought the suggestion of these gentlemen and elected to come under the Fair Labor Standards Act and pay them time and a half, on these records would you have a profit or loss?

A. Well, we would have certainly have had a loss, because this thing that these people are trying to impose on my little retail business would cost in the neighborhood of thirty or forty thousand dollars additional service wages.

Q. Now, you mentioned that you had retail—and that is one of the issues that I want to go into in your testimony.

From your long experience in the tire industry, do  
354 you think you are qualified to tell us what the phrase "retail" means in that industry?

A. Well, I don't believe there is any question. There is no question in my mind, and I have never heard it disputed by anybody in the tire business but what a consumer sale is a retail sale.

Q. Now, by a consumer sale do you mean a sale to some person who is going to use and consume the product?

A. Yes, sir, regardless of the price, quantity, or any other factor.

Q. As far as you are advised, and after having gone through rather extensive preparation getting ready for this trial, do you know of anybody in the tire industry that has any other view?

A. I do not.

Q. Now, the Government has got some experts, and sitting in the courtroom here.

Did you ever see any of those in the tire industry, Mr. Steepleton?

A. No, sir, I don't think so.



*Testimony of A. E. Steepleton*

Q. They are not competitors of yours?

A. I am sure not. However, I don't know all my competitors. I am not sure.

355 Q. Now, I want you to tell me whether or not, as defined in the tire industry, a sale to a purchaser not for consumption but for resale—whether or not that is a wholesale or retail sale.

A. Well, a sale to a person for the purpose of resale is certainly considered a wholesale sale, and is evidenced in this state by the absence of application of the Tennessee sales tax.

Q. No question that if you sell something to somebody, knowing that they are going to resell it, that you are a wholesaler in that aspect of your business?

A. That is right. And we are required to show their exemption certificate number.

Q. Now, is that the classification in the tire industry, those two illustrations you have given, that if it is for consumption or use, it is retail, and if it is for resale it is wholesale?

A. That is correct.

Q. Now, do you know or have you ever known of any other definition in the tire industry?

A. I have never heard of any other definition.

Q. Now, how many tire dealers—would you just take a random guess—are there in the United States?

356 A. That is a tough one.

Q. Well, are there many thousands of them, too?

A. There are many thousands, yes, sir.

Q. And if there is anybody in the industry that knows any different definition, it would not be any great trick for them to produce them, would it?

A. No, sir.

Q. Now, you mentioned about knowing the purchase and the use for which a purchase was made. You said something about sales tax exemption certificate.

*Testimony of A. E. Steepleton*

State whether or not every person——

Mr. Mitchell, have you got the Code there?

I want to know if at all times material to this case you knew that there was in effect a statute of the State of Tennessee for sales tax, and this law which provides in part as follows:

“Retail sales or a sale at retail means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property.”

Do you know that?

A. Yes, sir, I am familiar with that.

Q. (reading) “And shall mean and include all  
357 such transactions as the Commissioner on Finance  
& Taxation on investigation finds to be in lieu of  
sales, provided that the sales for resale must be in strict  
compliance with the rules and regulations.”

Now, did you know and have you conducted your business at all times material to this lawsuit, that all sales are retail other than for resale in the form of tangible personal property?

A. Yes, sir.

Q. So, as far as you are advised, the definition of the State of Tennessee in its code and the definition of the industry are identical?

A. Yes, sir.

Q. Now, when people come to you to buy something, since the State of Tennessee says that every sale is for retail—is a retail sale unless it is for resale, you have got to collect that three percent sales tax, don't you?

A. Yes, sir.

Q. Except in particular cases?

A. Yes, sir.

Q. Now, what are the instances when you don't have to collect that three percent sales tax?

358 A. Well, there are two instances. One is in the case of a dealer——

*Testimony of A. E. Steepleton*

Q. Let's don't go into use tax, out-of-state, things like that. Just go into—about the certificate of exemption.

A. In the case of a dealer buying for resale, he furnishes us with his tax exempt certificate, which qualifies him to purchase without the application of sales tax.

Q. Now, Mr. Steepleton, according to your previous testimony and according to this sworn answer to the interrogatory filed in this case, your gross dollar volume in sales in 1960 was nine hundred three thousand dollars and some odd figure. But nine hundred three thousand dollars, is that correct?

A. Yes, sir, that is substantially correct.

Q. And according to a tabulation which the Government has made as part of Exhibit 7, in that year your sales for resale were \$5,839—\$58,395.00.

Is that correct, substantially?

A. I imagine so.

Q. And our information is that if it is wrong, it is not much wrong?

A. No, it is not much wrong.

Q. Now—

359 A. (Continuing) There are some discrepancies in their audit, but it is substantially correct.

Q. Now, that \$58,395.00, was that sold to people who had certificates of exemption and who were resellers of what they bought from you?

A. Yes, I am sure it was.

Q. And was every other penny of that \$903,000.00 sold to people who did not have certificates of exemption and who were consumers of what they bought?

A. Yes, sir.

Q. And under the definition of the industry, and under the definition of the Code of Tennessee, was all of that \$903,000.00 of sales, with the exception of \$58,395.00, sales at retail?

*Testimony of A. E. Steepleton*

A. They were.

Q. Any exceptions to that whatever?

A. I don't see how there could be an exception.

Q. Very well, sir.

Now, the Government has put on this tabulation an item which I want to question you about at some length.

That is what they call national account sales. And they ran them into—classified them on Exhibit 7 as \$115,597.00 in the aggregate of sales to the General Tire & Rubber Company.

360 Were they sales by you at all?

A. No, sir.

Q. Well, now, just tell us what these transactions that have been lumped together as national account sales are.

A. Well, Mr. Burch, it is rather a bone of contention, sometimes with tire dealers, but our company and other rubber companies—

Mr. Burch: Go ahead, sir, I am listening.

A. (Continuing) —find it expedient to make some direct contracts of their own.

And as a part of our obligation as a franchise dealer, we are requested to make delivery of tires to their customers.

Q. Now, who does the billing of the customer for that sale?

A. The billing is done at our Akron home office.

Q. Do you do anything yourself other than maintain a stock of merchandise from which you make drafts for the customer, and advising the company that these drafts have been made on the stock for which you receive reimbursement to the value of the stock, plus a stipulated commission?

A. No other. That is, the one exception to that is that if we don't have the tires, we probably might go out to the division warehouse and pick it up for this customer of General and deliver it to them.

*Testimony of A. E. Steepleton*

Q. So you render a service to the General Tire  
361 for which you bill the General Tire Company, but  
you have no financial transaction with the customer  
whatever, do you?

A. Correct.

Q. Now, is that true of each instance of these \$115,597.00  
of aggregate sales that the Government has counted as  
sales by you—

Mr. Burch: Your Honor, may I stand around here  
where I can hand this to the witness?

You have seen that, Marvin?

Mr. Tincer: Yes, sir, Plaintiff's Exhibit number 3.

Mr. Burch: It is actually not, it is the same, but I don't  
think this—it is not marked as exhibit.

Mr. Mitchell: Down in the lower corner, Mr. Burch.

Mr. Burch: Oh, yes. I am sorry.

Q. (Continuing) I hand you herewith Plaintiff's Ex-  
hibit number 3, and ask you if that is a tabulation of  
national account sales.

A. I am certain it is, Mr. Burch.

Q. It may be stated that this—we have checked it and  
the Government has got it with reasonable accuracy.

362 A. All right.

Q. Now, will you, without making any attempt to  
be inclusive, just pick up three or four names on the sheet  
on there—some three or four sheets there. Call them out,  
so the Court will know the nature of the transaction.

A. Well, here is Kroger, Kroger and Continental Bak-  
ing Company, whose home office is at Cincinnati, and  
they have bakeries all over the country.

Q. Just give the rest of the names you picked out,  
please.

A. There is Wilson Packing Company, who have head-  
quarters in Chicago. Diamond Match Company, Texas Gas  
Transmission.

*Testimony of A. E. Steepleton*

And there are others who are classified in here that are manufacturers, such as Arrow Equipment Company, and so on, certainly who buy at manufacturers level, and we deliver tires to them for General Tire & Rubber Company.

Q. Now, you were shown—the Government asked you—and the Government identified as Exhibits 9 and 10 the ledger sheets of the company.

I will ask you to look at Exhibit number 9 which are ledger sheets showing these national account sales.

Now, in each transaction there, does it show to whom the delivery was made?

A. Yes, it does.

363 Q. Mr. Steepleton, will you pass that sheet to the Court.

Now, your typical ledger sheets which are identified as Plaintiff's Exhibit number 10 show only the person to whom the billing was made, is that correct?

A. That is correct.

Q. Now, do you ever—will you pass that to the Court, too?

Do you ever present the bill, or do you ever receive a check, or do you ever receive anything of financial value whatever from the customer of the General Tire Company who receives the product delivered to it under the national account sales?

A. I do not.

Q. Have no connection with it whatever?

A. No.

Q. Do you collect a sales tax from him?

A. No.

Q. And on that list that the Court has—the Exhibit 9 or 10, whichever it is—the one that has the big interlineations in it—did you collect a dime of sales tax on any of those transactions?

A. No, sir.

*Testimony of A. E. Steepleton*

Q. Now, on the others, which are typical ones that have the name of the customer at the top—the other  
364 sheets that the Court has—did you collect a Tennessee sales tax in each case?

A. Yes, sir.

Q. Unless they had a certificate of exemption?

A. Yes, sir.

Q. Did the transactions which involve the delivery of tires to the customer of General Tire Company there shown on the national account ledger sheet—were they carried into your profit and loss statement at all, sir?

A. They are not even entered into sales.

Q. They are not carried in your sales records?

A. And we collect no money. This is only a memorandum account.

Q. Now, was this system set up and was it in effect for years before you ever were favored with the acquaintance of Mr. Micklish?

A. It has been in effect for longer than I have been in the tire business.

Q. And this was something that had been long in effect, and nothing that was gotten up to meet the exigencies of this case?

A. Correct.

Mr. Burch: That is all.

365

**Cross-Examination,**

By Mr. Tinch:

Q. I have just a few questions, Mr. Steepleton.

A. Excuse me.

Q. With reference to the national account transactions, I believe that some of those customers, such as Arrow Equipment Company, you have testified were manufacturers and you were delivering tires to such customers to be installed on equipment which would then be sold, is that correct?

*Testimony of A. E. Steepleton*

A. That is correct.

Q. In addition to Arrow Equipment, then, do you recall the names of others who were national account customers—other manufacturers?

A. Well, we have made deliveries to some of the truck dealers.

Q. Tri-State Mack?

A. Specifically Tri-State Mack. You have to be able to get the Mack Truck Company to issue the purchase orders, and those tires were billed by General Tire & Rubber Company to the Mack Truck Company at Allentown, Pennsylvania.

Q. International Harvester is another one?

A. That would be correct.

Q. (Continuing) —in that category. How about 366 Foster Trailer Company?

A. Foster Trailer—

Q. Were such customers—were they people who would use the tires which you delivered to them on new manufactured equipment and would then resell that equipment, is that correct?

A. I presume so, yes, sir.

Q. Then, did you take into account those sales for resale, perhaps, when you told Mr. Burch that there were no other sales that had been made by Steepleton Tire Company?

A. We did not sell those tires, sir. We deliver them for General Tire & Rubber Company. They sold the tires.

Q. But, whether the sale was made by you or the General Tire & Rubber Company, at least those sales were not included in the figure that you stated a while ago as being substantially correct for all your resales, were they?

A. You will have to do that over.

Q. Let me back up just a minute. I think you are a little confused.



*Testimony of A. E. Steepleton*

Mr. Burch: Mr. Tincher, actually the figure fifty-eight thousand, our check has disclosed, for national accounts —though I don't think there is any importance—is  
367 actually about twenty-eight thousand dollars less.

We have taken in our retail sales everything you put in—I mean, the wholesale sales—our resale sales.

Q. The figure \$58,395.00 which you accepted as substantially the figure showing sales for resale did not include, did it, your sales to Tri-State Mack, to Arrow Equipment Company, to Foster Trailer Company and International Harvester Company?

A. I presume that you have those in the national account category, which is where they correctly belong.

Q. Your answer, then, is no, it is not included, is that correct?

A. I did not make your audit with that figure. I do not know what it is. You made it.

Q. What is the rate of commission which Steepleton Tire Company receives on these deliveries of tires to national account customers, Mr. Steepleton?

A. Well, it is not a constant thing. There was one time that there was a specific amount set up for each particular size and type of tire. And then later on it was changed to a percentage of the basic billing price. And I am not exactly certain what it is currently. But  
368 it has always been somewhere in the neighborhood of about ten percent, that is, those classed on the commercial—those classified as commercial accounts. I believe on manufacturers accounts it is about two and a half percent.

Q. That would be such accounts as Arrow Equipment Company and International Harvester, would not it?

A. Right.

Q. I want to show you here from Plaintiff's Exhibit number 3, the transcription that was made by Mr. Mick-

*Testimony of A. E. Steepleton*

lish relative to a delivery to a commercial account, if that will be sufficient—perhaps there is another one that will be more meaningful—this one which is listed—numbered as sheet 13, sold to General Tire & Rubber Company, date November 2, 1960, and the words “delivered to Tri-State Mack Distributor,” and I would like to ask you to explain the various percentage entries which appear on that invoice.

A. Mr. Tinch, as you probably know by now, since you have spent a lot of time on this case, that the billing price and billing procedure on tires has changed and fluctuated many, many times, as many as six times throughout the year that we are in question.

Now, in this particular instance, this was the buying price of this tire that we paid General Tire & Rubber Company originally for it.

369 And you will notice that up here in the corner it says S. M. 8—08176. That is the stock number—the number which we referred back to the invoice of General Tire & Rubber Company, showing where we bought the tires.

And the percentages that are discounted from the billing prices are our net cost, plus certain excess tax, which becomes the net amount that we originally paid for this tire on stock number—number 08176.

It is billed right back to them exactly like they bill them to us.

Q. All right. The percentages, then, which have been entered then on that invoice—the same percentages which were involved in your purchase—?

A. Yes, sir.

Q. (Continuing) —of this particular tire?

A. Yes, sir, identically, with one exception. Well, percentages, yes, sir. All the percentages are identical.

Q. So the purchase price which you paid for those

*Testimony of A. E. Steepleton*

tires to General Tire & Rubber Company is now the total which you are billing General Tire & Rubber Company for for having delivered those tires to the customer, is that correct?

A. That is correct.

Q. And in addition to that purchase price, you have  
370 entered on the invoice a percentage figure for the delivery charge, actually?

A. That is correct.

Q. Now, those tires which have been purchased from you on a stock number invoice number were added, I suppose, to your other purchases of tires throughout the year in arriving at the volume of tires handled by you during the year?

A. No, this is charged back.

Q. Were you and your company not given credit for those particular tires in arriving at your volume, which included bonuses?

A. No, this is deducted from your bonus statement, which—and would show the exact amount, and would pretty closely correspond with this tabulation of national account sales.

Q. If I understand correctly, the tires which you deliver from time to time to national account customers are tires which you carry in your stock and for which you have either already been—already made payment or for which you have already been billed by Steepleton—by—correction, by General Tire & Rubber Company.

A. In some instances, if we happen to have the tires, it is easier to deliver the one we have than it is to drive a mile out or two miles to get another one just like it.

371 Q. And you do in the regular course of business make such deliveries to General Tire & Rubber Company national account customers from your store?

*Testimony of A. E. Steepleton*

A. Yes, sir.

Q. Is any part of your stock obtained on consignment from General Tire & Rubber Company?

A. No, sir.

Q. Mr. Steepleton, what are the largest tires which your company stocks and that were regularly in stock?

A. You mean my company?

Mr. Tinch: Yes, sir.

A. Or General Tire & Rubber?

Q. Steepleton Tire Company. Just describe or tell what the largest tires are, the largest ones that you have carried in stock.

A. I think the largest I have in stock right now is a 26.5/25.

Q. And on what type equipment would that size tire be used?

A. Earthmoving equipment.

Q. Pardon?

A. Earthmover.

Q. Did you carry such equipment in stock in 1960?

A. I don't recall. I doubt if we did, because I just recently got into the earthmoving phase of the business.

372 Q. Yes, sir. On the other larger tires that you have carried in stock, what types of vehicles would they be used on?

A. I don't know if I understand what you are getting at.

Q. Are the others just over-the-road truck tires?

A. All size tires, be different sized stock.

Q. For earthmoving equipment?

A. Road graders, too. Airplane tires or anything, earthmoving, all kinds.

Q. When you sell this large earthmover tire, do you consider you are making a retail sale?

*Testimony of A. E. Steepleton*

A. Yes, sir.

Q. When you sell such equipment as that?

A. If the man is going to use them, yes sir.

Q. Is the same true if you are selling airplane tires?

A. Yes, sir.

Q. Do you carry in stock and make sales of aircraft tires which are used by the large commercial airlines flying in and out of Memphis?

A. No.

Q. You do not?

A. No.

Q. Would you tell some of the largest over-the-road  
373 type of truck tires which you have carried in stock?

A. Well, I think that 1100/22 is about considered the largest type that is normally used in over-the-road highway transports.

There are some others, larger sizes, but they are rare.

Q. Well, is the 1000/20 size tire another size tire?

A. 1000/20 is probably the most commonly used, yes, sir.

Q. What size equipment are they used on normally?

A. What size?

Q. Yes, in regard to the tractor-trailer transports.

A. Well, they are usually used in over-the-road transports but probably haul anywhere from twenty to thirty thousand pounds pay load.

Q. And even though you sell those in large quantities to a particular transport company, you consider that nevertheless to be a retail sale?

A. Yes, sir.

Q. Would that be true even if you sold as many as fifty 1000—size 1000/20 truck tires to Gordon Transports, for example, who would then put them in stock and use them as the occasion arose?

A. Yes, sir.

*Testimony of A. E. Steepleton*

Q. Would your answer be the same, or would you  
374 consider that nevertheless a retail transaction if  
you sold as many as two hundred of those truck  
tires?

A. We would still have to charge sales tax on this,  
Mr. Tincher, so it would still be a retail sale.

Mr. Tincher: I believe that is all.

**Redirect Examination,**

By Mr. Burch:

Q. Just a minute, Mr. Steepleton.

Do you know anything about this phrase that the Gov-  
ernment lawyers have been using about discounts from  
list price, and that sort of thing?

A. Well, I think that in most cases the manufacturers  
of practically all commodities put out some kind of sug-  
gested list price.

Q. Well, are they anything more than suggestions?

A. But they are nothing more than a suggestion, be-  
cause in the highly competitive market on truck tires the  
net price is all we ever quote.

Now, we may have a method of arriving at net price.  
We might have—figure some discount from their sug-  
gested resale list, or we might take our cost price and  
add the profit to it, but we sell on that price basis.

Q. Well, is it or not, as has been suggested here,  
375 that the user of many tires and the big purchaser  
always get a better price for the same tire than  
the little purchaser?

A. Not necessarily so, no, sir.

Q. It depends on the competitive situation of the market  
at the time, and many, many factors, does it not, other  
than the size of the purchase?

A. Yes, sir, it depends on the market conditions at the  
time, and—

*Testimony of A. E. Steepleton*

Q. Do you know the Engelberg Packing Company, sir?

A. Yes, sir.

Q. A big operator here with a lot of trucks, aren't they?

A. Yes, they are. The plaintiffs subpoenaed Mr. Engelberg into court to show that he had a lot of trucks.

Q. Do you know George Harris?

A. George Harris is a colored school bus driver.

Q. Got one school bus, hasn't he?

A. Yes, somewhere—something like that.

Q. The Government did not subpoena him, as far as you know, did they?

A. No.

Mr. Ray: I would like to inquire, if I may, the purpose of this.

Mr. Burch: I am going to show you, by a comparison on the invoices, that Engelberg Packing Company  
376 and George Harris, who is a colored school teacher, paid the same thing for a set of tires.

Mr. Ray: What does the connotation there that the Government did not subpoena him mean? Or is that some particular meaning?

Mr. Burch: The Government, like everybody else, is not the great white father that it sometimes purports to be. And if I might, I would like—would like to show that?

Is that all right?

Mr. Ray: Well, we concede that. You don't have to prove that.

Well, now, go ahead, then.

Q. Now, do those two invoices show what I suggested that they might show?

A. They do, sir.

Q. Just state what they show, just call them off.

A. Here is Engelberg Packing Company, two 750/20 Traction Rib 10 ply truck tires at \$78.00, plus federal excise tax and sales tax.

*Testimony of A. E. Steepleton*

Here is George Harris, who is a little farmer I think out here at Millington and operates a school bus.

377 The two are identically the same tire at identically the same price.

Q. What dates were they bought on?

A. Engelberg Packing Company invoice is 11-29-60. And George Harris is 9—looks like 19-60.

Mr. Burch: Now, I ask those just to be marked the next exhibit.

(Thereupon said copy of invoice to Engelberg Packing Company was accordingly marked as Defendant's Exhibit C and said copy of invoice to George Harris was accordingly marked as Defendant's Exhibit D, respectively, and same will be found among the exhibits in the cause.)

Q. Whartons Transport is another one of the ones subpoenaed by the Government, aren't they?

A. Yes, sir.

Q. A big operator?

A. Yes, sir.

Q. And who is C. E. Lomax?

A. C. E. Lomax is a gravel hauler. I think he has one dump truck, maybe two. I don't know.

Q. And who is H. L. McClellan?

378 A. H. L. McClellan is a little account at Tupelo, Mississippi.

Q. And Bryce Packaging Company?

A. Bryce Packaging Company is a small account here that has two or three trucks.

Q. I hand you herewith a sheaf of invoices, and ask you if that does not show you sold them the same merchandise, to all of them, at substantially the same price?

A. (Witness examines documents) Yes, sir.

Mr. Burch: Make that—

A. (Continuing) For a clarification, Mr. Burch, there is two items on this Lomax invoice, so I wanted to be sure that they don't confuse one kind of tire with another.



*Testimony of A. E. Steepleton*

Mr. Burch: Make that the next exhibit, please.

(Thereupon said copies of documents were accordingly marked as Defendant's Collective Exhibit E, and same will be found among the exhibits in the cause.)

Q. Ace Freight Line, is that a pretty good size operator?

A. Mr. Yost, at Ace Freight Line, was subpoenaed by plaintiff, but I don't believe he has had the opportunity to testify, but I think he is a pretty good sized operator.

Q. Chapman Chemical Company?

A. Small.

379 Q. But were subpoenaed, were they not?

A. Yes.

Q. And W. L. McClellan?

A. I think there again is the same party down at Tupelo, Mississippi, a small operator.

Q. Did all those purchasers get the same price on the same item?

A. They are not all exactly the same, but they are close, and very close to the same price. There is very little difference.

Mr. Burch: Make that collective Exhibit F.

(Thereupon said copies of documents were accordingly marked as Defendant's Collective Exhibit F, and same will be found among the exhibits in the cause.)

Q. Actually, Mr. Steepleton, I am taking time on something that I think is not material, and I want to simplify it by asking you this:

If you could show that they all purchased at substantially the same prices, if you had charged the little man three hundred percent more than you charged the big operator, would they both in the tire industry still have been retail sales?

A. Yes, sir.

380 Q. Would not have made any difference about the price, if they were all used by the consumers?

*Testimony of A. E. Steepleton*

A. Correct.

Q. Now, my friend Mr. Tincher here asked you something if you sold some airplane tires to big operators, wouldn't you consider that a wholesale sale, and you answered that it would be a retail sale, as I took it.

A. That is correct.

Q. Now, I want to read you this definition. It is called the retail sales tax act.

“ ‘Retail Sales’ or a ‘sale at retail’ means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property.”

Now, you and everybody else in the State of Tennessee operating under that act have to collect that tax, don't you?

A. Yes, sir.

Q. You read here in the newspapers where business men have been indicted for failure to comply with it here within the last ninety days?

A. Yes, sir.

Q. Now, as much as we like Mr. Tincher and these other gentlemen, do you know whether any of their  
381 interpretative bulletins would help you if you were indicted for the violation of that statute, as calling it as something different from what the law says it is?

A. I don't believe they would.

Mr. Burch: That is all.

Mr. Ray: What about that are you relying on—to show the materiality—is that the purpose?—

Mr. Tincher: May I see these last exhibits?

**Recross-Examination,**

By Mr. Tincher:

Q. Just one or two questions with regard to these latest exhibits.

In Defendant's Exhibit C, reflecting a transaction with Engelberg Packing Company, and one with George Har-

*Testimony of A. E. Steepleton*

ris, did your company provide services in the way of inspection, removal and mounting tires for Engelberg Packing Company of the nature that has been testified to?

A. Yes, sir; yes, sir.

Q. Did your company provide such services for Mr. George Harris?

A. Yes, sir.

382 Q. Were those provided on a regular basis, then, at Mr. Harris's place of business?

A. Mr. Tincher, the degree of service that is rendered any customer is relative or proportionate to the amount or number of vehicles and the amount of tires he operates. And we render this same service to the passenger car buyer. I think that it is common practice in many instances in industries such as the gasoline stations that you probably went by, if you bought gasoline once a week, you get the windshield wiped off once a week; if you bought every day, you got it wiped off every day.

Q. Now, will you answer my question.

And still you would send the service truck to Mr. George Harris's place of business or to his home to inspect his tires or rotate them, or match and mate those tires or put air in the tires, as you did to Engelberg Packing Company's place of business and other of your larger customers?

A. Yes, sir.

Q. You did that? Who was the service man?

A. I am sure we did. I don't know of any other way we would have got tires on the bus without going out here and putting them on.

Q. Do any of the customers come to your place of  
383 business with a single vehicle that want tires?

A. Well, as far as the truck tire business is concerned, very few, because we are so—it is such a very small place and small service area that we can't service

*Testimony of A. E. Steepleton*

them there. I would say that ninety-nine and ninty-nine one hundredths percent of our truck tire business is handled away from our place of business.

Q. But it was your practice to have a regular time for your service trucks to go to the larger customers to service their tires or rotate and match or mate, pull and mount, but the smaller customers you did not provide that service, is that correct?

A. Yes, sir, I did. However, I would like to qualify that a little bit.

If a man is operating twenty trucks, he requires probably weekly service. If he is operating one truck, we probably won't have to go check on him but maybe every three or four months.

Q. Approximately—

A. (Continuing) It is still relative to the amount of business, the number of trucks and tires he bought.

Q. The fact is the operator of a single truck, normally you would be simply told by the service man at the  
384 time he figured now maybe Mr. Harris is ready for new tires or would have a couple of tires recapped, is that right?

A. Either by the salesman or by the service truck. Often we have the service truck when he is in the vicinity, and we go by there and perform whatever—see whatever service is necessary.

Q. I wish you would explain just a little bit for clarification the manner in which your sales to the various county governments or other governmental units have been made, Mr. Steepleton.

A. How they have been made?

Q. Yes, the manner in which those sales are handled and the pricing that you make the sales at.

A. Well, they are made by solicitation of our salesmen, and the pricing we get is all we can.

*Testimony of A. E. Steepleton*

Q. Well, isn't it a fact that in respect to substantially all your county governments, county school boards, county highway departments, that you have made the sales at the regular published State list price?

A. We have been forced to meet some very low competitive prices in some instances.

Q. Yes, sir. And that has been the same price—the usual price at which you made this type of sale, hasn't it?

A. Well, some have been sold at that price, some 385 higher and some lower.

Q. Yes, sir. When the sale is made at the State list price, what it is, tell the Court whether that State list price is lower or as low as your dealer price at which you have been billed for the tires.

A. It is lower, usually lower, and sometimes considerably lower, because we are only meeting a competitive situation.

Q. Now, when you sell tires to a county highway department at a price which is less than the price at which you were billed for the tire, will you explain how you can carry on that transaction without monetary loss?

A. Well, we are really—usually we are always reimbursed by our supplier.

Q. By the General Tire?

A. For the delivery.

Q. By the General Tire & Rubber Company?

A. Yes, sir.

Q. How is that reimbursement handled?

A. Through the claim, we are also reimbursed for the federal excise tax for which they are exempt.

Q. After you have been credited with the difference between the price you paid and the price at which you sold the tire, plus the federal excise tax which you  
386 have already paid on your purchase of the tire, do you get any other reimbursement from General Tire & Rubber Company on such transactions?

*Testimony of A. E. Steepleton*

A. We get a delivery commission comparable to the national accounts commission. And there again, this volume of sales is deducted from our purchases for the purpose of figuring volume, same as the national account sales.

Q. Instead of deducting the total purchase price of this tire, does General Tire & Rubber Company simply deduct the difference between your selling price and your purchase price, plus the federal excise tax?

A. They reimburse us at the selling price.

Q. For the difference between——?

A. The difference between selling price and——

Mr. Burch: If Your Honor please, we can go on as long as counsel wants, but that has nothing to do with retail.

Surely, a man is not going to buy gas for 22.9 cents a gallon, if a company just temporarily voluntarily determines to let a dealer make those sales—nobody would suggest that is not retail.

Mr. Tincher: I understand it, Your Honor. This has been the practice over many years, and not the result of any temporary situation.

387 Mr. Burch: Then too with Standard Oil Company, Your Honor, for twenty years. And the price in this one industry—it happens every day—you have got to keep your people competitive.

Q. Is there any difference, then, Mr. Steepleton, between the transactions where you have delivered tires to customers of General Tire & Rubber Company under the national account transaction type of business and the sales of tires to a county highway department under the arrangement you have just described?

A. A very distinct difference. This sale to our county highway department is a retail sale because it went to consumers, and we do the billing and not General Tire & Rubber Company. And it is very, very different.

*Testimony of A. E. Steepleton.*

Mr. Tincher: Yes, sir.

A. (Continuing) This is only a price protection arrangement.

Q. And you consider that was a retail sale, notwithstanding the fact that the county highway department is purchasing those tires at less than the dealer price you had to pay for tires?

A. Certainly. Our people go out, service and mount those tires and take care of them from now on  
388 until they are worn out. And the complete concept of it is a retail transaction, a service company taking care of its retail customers.

. . . . .

389

**Recross-Examination (Further),**

By Mr. Tincher:

Q. Mr. Steepleton, in your testimony yesterday, you made some statement in regard to sales of earthmover tires, and I believe you stated that they were considered by you sales—that is, of earthmover tires—to be retail sales, is that correct?

A. Yes, sir.

390 Q. And do I understand correctly that during 1960 you were making sales of earthmover tires to contracting companies and to county highway departments, among others of your customers?

The Court: Excuse me just a minute.

A. I am sure that we had them for sale, and it is very possible we sold some.

Q. And that is a regular part of your business, isn't it, normally?

A. Yes, sir.

Q. To sell such tires.

What is the size of earthmover tires? Are they pretty much all the same size or they vary in size?

*Testimony of A. E. Steepleton*

A. Vary, many types tires, types, descriptions, a great many.

Q. Would the 26.5/25 be one of the usual sizes that you would sell?

A. Yes, sir; yes, sir.

Q. And do you sometimes sell those in quantities of more than one at a time?

A. We would love to. Very seldom ever do but usually one or two at a time.

Q. And how much would one of those tires weigh, Mr. Steepleton?

391 A. Approximately a thousand pounds.

Q. And what is the usual price for that size of tire.

A. Whatever we can get for it.

Q. Well, I assume that you try to sell it for a profit rather than sell it for a price which the customer will pay?

A. Well, very naturally, that would be the purpose of being in business.

Q. Yes, sir. Now, I will show you here from the price catalog which Mrs. Lauderdale identified in her deposition.

Turn over in that on page six, which is headed "Earth-mover Tires" and I ask you to look under the heading "All Duty-Wide Base—Nygen" tires, size 26.5/25.

Mr. Mitchell: Just a minute.

Mr. Tincher, before you let it be passed up, could you indicate the date of the catalog to which you have just referred?

Mr. Tincher: If I recall correctly, there are several dates there since the collection of sets of prices have been compiled at different times.

This is in the commercial price of truck tires and tubes, effective date December 7, 1960.

Mr. Mitchell: Thank you.

392 Mr. Tincher: And also in this same catalog of general prices for February 16, 1960.



*Testimony of A. E. Steepleton*

Q. Before you attempt to answer the question, would you first tell me whether your earthmover tires are carried in your stock as general truck tires in the category of truck tires?

A. Yes.

Q. When they are placed on your invoices——?

A. That is as far as our own inventory accounting is concerned.

Q. Yes, sir. And for your accounts receivable ledger, they would appear with the symbols G. T., is that correct?

A. Right.

Q. Now, if you will look on the price list there at 26.5/25 here about Nygen, would you tell me at what price that size tire was listed in the catalog there?

A. Well, on this particular price list it was \$2,248.95.

Q. Yes, sir. Now, could you give us some idea of the price at which you were selling that particular tire during the year 1960?

A. Somewhere in the neighborhood of nine hundred dollars.

Q. To contractors and the highway department customers?

A. Anybody that would buy it. That was about the market price on that type tire at that particular time, I presume.

393 Q. Well, as a general rule, wouldn't those be the only type of customer to whom you would have sold that type of tire?

A. Well, certainly I don't think you would buy one.

Q. Yes, sir. But, in other words, contractors and county highway department would?

A. People who own earthmover equipment.

Q. Yes, sir. Now, I will show you here a transcription sheet which has been made from an invoice for Tipton County, which indicates the sale of such a tire.

*Testimony of A. E. Steepleton*

Do you recognize that as being the type of invoice from your company which would be shown with reference to such a sale?

A. It could be. It is only some figures that were put on here by your—what do you call him?

Q. By Mr. Micklish?

A. Yes. This isn't an invoice.

Q. No, but it is taken from the invoice, is it?

Do you see the price at which that tire sold?

A. \$952.77.

Q. \$952.77, is that correct?

A. That is the figure you have on there, yes, sir.

Q. Now, this particular invoice, which is of the Steepleton books and records, which has been copied, and

394 I will ask you to read the notation at the bottom of the sheet.

A. Mr. Micklish or someone has written on this piece of paper. It says: "This price is on state and county billing price and is due the tenth of following month after purchase, and if not paid by that date, ten percent a month will be added until the retail price of \$2,261.65 is reached."

I doubt very seriously if that was billed to a county. I don't think it was.

Q. If you were told the invoice so indicates, you would not have any reason to question that was billed to Tipton County?

A. I certainly would not, no, sir.

Mr. Tincher: May I ask that this transcription be identified as Plaintiff's Exhibit number 11.

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 11, and same will be found among the exhibits in the cause.)

. . . . .

395 Q. A little further clarification, Mr. Steepleton, on Plaintiff's Exhibit number 11.

*Testimony of A. E. Steepleton*

This, I take it from your testimony, there is no question but that it relates to a sale in 1960, November 12th to be exact, to Tipton County, is that correct?

A. I don't know, sir. I would have to see the invoice. I can't remember twenty thousand invoice numbers and tell which one is which.

Mr. Burch: Mr. Tincher, obviously he can't remember the only invoice you picked out in five years at the business, but I will stipulate it is exactly what you say it is.

Now, you state into the record exactly what you say it is.

Mr. Tincher: Exhibit 11—Plaintiff's Exhibit 11 is transcription made in part from invoice number 668999, dated November 12, 1960, evidencing the sale of an All-Duty Nygen 26 ply earthmover tire to Tipton County, the Highway Department of Tipton County, Tennessee.

Mr. Burch: It may be stipulated that it is just like Mr. Tincher said it is.

Mr. Tincher: Thank you.

Q. Mr. Steepleton, the price schedule which you had in your hands a moment ago, which I will again point to you, has a section headed "Commercial Price List."

What type tires are included in that section headed "Commercial Price List"?

A. Principally truck tires, earthmovers.

Q. Is that the type of price catalog which your salesmen use from time to time in making sales in the year 1960?

A. Well, they use six different price lists during the years so I presume this is representative of those few weeks that might have been—

Q. Yes, sir. And throughout the year 1960, I suppose there was a section which was headed "Commercial Tires" or "Commercial Sales" as it is in that one, is that correct?

*Testimony of A. E. Steepleton*

A. I am not sure who the accounts were.

Q. In your business, and in the tire business generally, isn't it true that you have not only your dealer sales and your retail sales, but that you have a classification known as commercial sales?

A. Well, the term "truck tires" and "commercial" are more or less synonymous, and that is quite often the definition given to the truck tire price list.

Q. And that has been true over the years, then, has it not?

A. Well, one of them is headed "passenger tire list" and one is with the heading "commercial tires."

Q. And it is true approximately six outside salesmen who were employed in the year '60 were termed in your business records as commercial salesmen?

A. Truck tire salesmen, yes, sir.

Q. Commercial salesmen?

A. Truck tire salesmen.

Q. Now, answer my question, Mr. Steepleton. Were  
398 they or were they not termed commercial salesmen?

A. Well, they could have used—either term could have been used.

Q. And it was used, was it not?

A. I am sure it was.

. . . . .

399 Q. Yesterday a copy of an invoice was made Exhibit C to your testimony, relating to Engelberg Packing Company, and Exhibit D relating to a sale to George Harris.

I believe your testimony was that the actual price of the tires was the same.

400 I will ask you to look at Exhibit C and tell me whether or not the two tires that were sold to Engelberg Packing Company on that invoice were billed at \$70.17 rather than at \$78.00.

*Testimony of A. E. Steepleton*

A. Well, I think you will see that this is—there is a reference to an incorrect price on this and a correction showing the correct billing.

Q. Does it show on the invoice that that is a correction?

A. Yes, sir.

Q. Would you read that language there?

A. It says, "Additional billing on invoice number 67678," describes the merchandise, "Billed at \$70.17, should have been \$78.00," and difference of \$7.83 charged each.

Q. In addition to dealer sales, which you testified yesterday are exceptions from the requirement for collecting Tennessee sales tax, is there not another exception, namely where you perform recapping for the customer and have other service charges, rather than sales of merchandise?

A. I think the Tennessee Code does not provide or not permit us to collect sales tax, but we pay the State of Tennessee a use tax on materials used.

Q. That would be the raw rubber with which you recap the customer's tires, is that correct?

401 A. Yes.

Q. That use tax is three percent, is it not, I believe, the same as the sales tax?

A. Yes, sir.

Q. And your company also pays such a three percent use tax on merchandise which you take out of stock and use on your own vehicles, does it not?

A. Yes.

Q. And you so report that in your Tennessee sales tax return?

A. I am sure we do.

Q. The use tax and sales tax are lumped together and reported on one report to the State of Tennessee, is that right?

*Testimony of A. E. Steepleton*

A. I don't make out the reports, Mr. Tincher. I assume that is right.

Q. And this portion of your business——

A. (Continuing) I believe the use tax is charged to us directly by the General Tire & Rubber Company on their invoices for materials.

Q. Do you know whether that is true?

A. I don't know, but I think it is.

Q. This portion of your business made up from receipts for recapping of tires and performing services,  
402 repairing tires and service call, and so forth, makes up approximately forty-five percent of your gross business, does it not?

A. Name the category again.

Q. The recapping and service, just the things other than sales of merchandise.

A. Probably somewhere in the neighborhood of thirty-five or forty percent.

Q. I believe you testified earlier it was forty-five percent in your deposition. Is that not right?

A. I don't recall the exact percentage. I am sure—don't think it is important.

Mr. Tincher: No further questions.

**Redirect Examination,**

By Mr. Burch:

Q. Mr. Steepleton, have you ever sold one of those earthmover tires for as much as twenty-two hundred dollars?

A. No, not that particular described item, no, sir.

Q. If, for instance, I owned a farm down in the delta and had a Euclid on it that would use those tires, and I would come into your place to buy an item that expensive, could I have bought that tire for just exactly what it was sold to Henry County or Tipton County?

*Testimony of A. E. Steepleton*

A. Yes, sir.

403 Q. If I had sense enough to accumulate——

A. (Continuing) ——at that particular time.

Q. If I had sense enough to accumulate the money to buy a farm, it would be unlikely that I would be stupid enough to pay twenty-two hundred dollars for something that the market was nine hundred, and you would assume that, wouldn't you?

A. Yes, sir.

Mr. Burch: Now, where is that transcript?

Just give it to me there, will you, please?

Q. Now, with reference to the credit item that was put down there to prompt the customer to pay is—what is the price, nine hundred and what?

A. \$952.77.

Q. Is that a retail price?

A. That is a retail price.

Q. Why is it a retail price?

A. It is a retail price, it is what marketing conditions dictated.

Q. Is that tire sold to a user?

A. Yes, sir.

Q. If Henry County had been stupid enough to pay twenty-two hundred dollars, and you had been  
404 greedy enough to ask them to pay it, would the price have been a retail price?

A. Well, I think anything we collect would be a retail price.

Q. Why?

A. Because we sold the consumer.

Q. If the credit of Henry County had been sticky and the account had run six months, and you had gotten ten percent a month, would the price have been a retail price?

A. Yes, sir.

Q. Why?

*Testimony of A. E. Steepleton*

A. Because it was sold to the man who used it, the man that consumed it.

Q. Is there anything on that invoice—and look at it carefully—that indicates that the price is not a retail price?

A. Not one thing.

Q. Now—

A. (Continuing) Other than something that somebody wrote here with reference to—

Q. Well, read it too.

Does that say that \$903.00 is not a retail price? Does it say it is a wholesale price?

A. Well, he has copied something here that says—

405 Q. Instead of trying to interpret it, suppose you just read it, will you, Mr. Steepleton?

A. Says: "This price is on straight and county billing price and is due the tenth of following month after purchase, and if not paid by that date, ten percent a month will be added until the retail price of \$2,261.65 is reached."

Q. Is there one word in that \$903.00 is not the retail price?

A. I did not understand. What is that?

Q. You find the word "wholesale" in there with reference to nine hundred and three?

A. No, sir.

Q. Is any transaction in the tire industry, based upon your experience of many years in it and in the many aspects of it, is any transaction where the goods are sold to the consumer a retail transaction?

A. I would say that all goods sold to the consumer is a retail transaction.

Q. Now, you were asked by these gentlemen about exceptions to the Tennessee sales tax about recaps.

And that is a third one, isn't it?



*Testimony of A. E. Steepleton*

You didn't charge any sales tax to municipalities and counties, did you?

406 A. No.

Q. Any of them?

A. No, sir.

Q. That is an exemption under the law, isn't it?

A. Exempt.

Q. Now, you were asked about a commercial list. State whether or not they are lists of tires that are used by commercial vehicles.

A. That is a synonymous term with the nomenclature of named price lists.

Q. The word "commercial" refers——

A. Refers to type——

Q. (Continuing) ——type vehicle on which the tire is to be used, is that not correct?

A. Correct.

Q. And the type of salesman refers to the salesman who solicit owners of commercial vehicles?

A. Correct.

Q. There is no implication that the salesman is soliciting people who resell tires in the industry?

A. No.

Q. As a matter of fact, the amount of solicitation that those salesmen do to resellers is infinitesimal, isn't it?

A. There is very little of it. The fact of the matter  
407 is they are not requested to solicit business for resale.

Q. As far as soliciting of that sort, it is virtually non-existent?

A. That is right.

\* \* \* \* \*

*Testimony of Walter E. deBruin*

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**WALTER E. deBRUIN,**

witness in behalf of the defendant, having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Mitchell:

Q. Would you state your name, please, sir.

A. Walter E. deBruin.

Q. And, for the record, the spelling of that is small d-e capital B-r-u-i-n, is that correct?

A. That is correct.

Q. Where is your home, Mr. deBruin?

A. Akron, Ohio.

Q. You are an attorney, I believe?

A. Yes.

Q. And you are employed in the law department of a large corporation, is that correct?

A. The Goodyear Tire & Rubber Company.

Q. Yes, sir. And is the law department of that corporation at the main office there in Akron, Ohio?

A. Yes.

Q. And your office in Akron is where?

A. In the law department at Goodyear.

Q. But the address is——?

A. 1144 East Market Street.

409 Q. For how long have you been in the law department of Goodyear Tire Company?

A. Since February, 1930.

Q. In the course of your duties as an attorney in the law department of Goodyear Tire & Rubber Company, did you familiarize yourself with, study, and generally become acquainted with the Fair Labor Standards Act soon after its passage in 1938?

A. Yes.

*Testimony of Walter E. deBruin*

Q. After or shortly after that act was passed, did you assume responsibility in the law department at Goodyear Tire & Rubber Company for the handling of that company's matters in connection with the Fair Labor Standards Act procedures and practices?

A. Yes.

Q. Would you explain briefly about what time that occurred and the circumstances of it coming to you as one of your responsibilities?

A. My recollection is that my first acquaintance with the Fair Labor Standards Act was about the year 1940. I had been in the department for about ten years on other work, and my associate who had been doing work with the Fair Labor Standards Act since its passage in 1938 was assigned to the Goodyear Aircraft, our aircraft subsidiary.

Q. Was this—?

A. (Continuing) Then I—at that time I assumed responsibility for following the Fair Labor Standards Act.

Q. So that it became one of your principal responsibilities as of about 1940, as you remember?

A. As I recall, that was about the date.

Q. Do you connect the transfer of your associate to go to the aircraft subsidiary as being part of the war?

A. Yes.

Q. That is World War II, or defense aircraft, and that sort of thing?

A. Yes, sir. Our aircraft corporation expanded quite rapidly and so did a volume of business.

Q. In connection with your activities in there following 1940, did you have occasion to participate in any litigation in which issues of the Fair Labor Standards Act were involved in behalf of Goodyear Tire & Rubber Company?

A. Yes, I followed with local counsel any litigation in which the company was a defendant which involved

*Testimony of Walter E. deBruin*

Fair Labor Standards Act. I would hasten to say that we were never a defendant in a Fair Labor Standards Act where the Secretary of Labor was the party plaintiff.

411 Mr. Mitchell: Yes.

A. (Continuing) We did have several cases brought by former employees.

Q. Yes. Was the Cron case that was decided in Middle Tennessee—and, just for the record, it is reported in 49 Federal Supplement 1013, and the style of the case is Cron vs. Goodyear Tire & Rubber Company—was that one of the cases in which you participated along with, of course, local counsel?

A. Yes.

Q. And do you recall approximately how many there were? The Cron case apparently was heard in about '43. Do you recall about how many other similar cases, that is, cases brought by employees under the Fair Labor Standards Act against Goodyear, in which you participated?

A. My recollection is that we had five or six that were tried.

Q. Yes. Now, then, Mr. deBruin, during the period between the enactment of the Fair Labor Standards Act in 1938 and its amendment, and the enactment in 1949 of the specific and more elaborate Retailers' Exemption, did you have frequent and regular occasion to check  
412 into that law and to ascertain the various components of Goodyear Tire & Rubber—if it were in compliance where they were covered, and tend to such matters?

A. Yes. We never raised any question but what we were involved in interstate commerce, and part of our business involved a great number of retail stores through the country, many of which were subject to the Fair

*Testimony of Walter E. deBruin*

Labor Standards Act and some of which were exempt, and it was my responsibility to follow the requirements of the law and issue instructions to our retail stores division and to see that our stores were at all times in compliance with the Fair Labor Standards Act.

Q. Yes. And was it true that all the stores operated or managed through Goodyear Tire & Rubber Company prior to '49 were covered, or were there some which by reason of circumstances were covered and some exempt and were not covered?

A. No, there were some stores that by reason of exemption were not covered by the Fair Labor Standards Act.

Mr. Mitchell: Yes.

A. (Continuing) And still are not.

Q. Yes. In regard to the period I am discussing, this was exemption for retail establishments as it  
413 existed before the 1949 amendment.

A. That is correct.

Q. Now, then, did you from time to time have occasion to become familiar with the procedure and practices in the Field Office or perhaps Division Office of the Wage and Hour Administrator, and, if so, would you generally describe what procedure was followed by you in behalf of Goodyear Tire & Rubber Company with regard to whatever disagreements or questions of what-not that might come up under the Fair Labor Standards Act?

A. Yes, early in the administration of the Fair Labor Standards Act we had an agreement with the Department of Labor which was mutually advantageous. Should we get a complaint from a store out some place in the field it had been mutually agreed between Goodyear and the Department of Labor that the investigator in the field would make his report, and then his report would be turned in at the Cleveland office of the United States Department of Labor, and the investigator from the

*Testimony of Walter E. deBruin*

Cleveland office would bring it to my attention. He and I would study what the investigation had disclosed. It gave me the opportunity then from the home office to check through our retail operation department to make an independent investigation. And so practically  
414 ever since the adoption of the Fair Labor Standards Act that is the arrangement which we had made with the Department of Labor and under which we operated.

Q. Just for the record, Mr. deBruin, you have indicated your home office is at Akron. Is that real close to Cleveland and the Labor Department Office?

A. Yes, it is about thirty-five miles away.

Q. Now, then, prior to '49 were there any conferences that you had about minor disputes with Wage and Hour personnel, or any cases with which you became familiar through your review of information that you had of the Labor Department's that concerned or decided this issue of what is a retail sale in the tire retailing industry?

A. Well, that had been a matter of discussion between the rubber industry generally. I speak of it that way because I was familiar with the fact that other men charged with similar responsibility for the other rubber companies at Akron had discussed with me this question of what is a retail sale. We had discussed it with representatives of the Department of Labor, and we had not reached any unanimity of opinion.

Q. But prior to 1949 was there any thrashing out  
415 of this or was there any litigation on the issue?

A. No, there had never—to my knowledge there had never been any litigation which gave us any guide—litigation.

Q. Now, then, in connection with the 1949 amendments to the Fair Labor Standards Act, and in particular regard to the Retailers' Exemption then enacted, did you, as a

*Testimony of Walter E. deBruin*

member of the law department at Goodyear Tire & Rubber Company, and other attorneys in similar capacities for other rubber manufacturing companies follow this legislation and the Congressional history of it with some interest as perhaps a key or solution to some of your problems?

A. Yes. We took no steps to influence legislative action, but we were following the reports that came from the Congressional committees, and obviously, when the law was enacted we studied it with great interest.

Q. Now, then, Akron of course is known as the rubber city of the world, is it not. But, for the record, would you indicate which of the ones of the tire manufacturers, then, have their home offices situated at Akron?

A. Well—

Q. In addition, of course, to Goodyear Tire Company.

A. In addition to Goodyear, there is General, Fire-  
416 stone, Goodrich and Mohawk. Mohawk is a smaller company. Also Seiberling. But the so-called big four all have their offices in Akron.

Q. That is my next question. The four you named, Goodyear, Goodrich, Firestone and General are known in the industry as the big four?

A. Yes.

Q. Outstanding in sales, are they not?

A. I might clarify that, sir. U. S. Rubber is sometimes put in that classification. I did not mention them because they do not have a home office in Akron.

Mr. Mitchell: Yes.

A. (Continuing) They also—I think they may be fourth or fifth or sixth in sales.

Q. Well, my question, of course, was directed to the ones located in Akron because you have already referred to it a time or two, so we are describing this that way, et cetera.

A. Yes.

*Testimony of Walter E. deBruin*

Q. You met with attorneys having similar positions for the other three of the big four in Akron?

A. That is right.

417 Q. Now, then, what was the expression, what was the understanding of the Retailers' Exemption under the 1949 law as it might apply to tire retailing on your behalf and those of other solicitors or counsellors for tire industry companies in Akron upon the passage of this law? That is, what kind of key, how did you think this would facilitate your problem?

A. Well, we felt that, because the law for the first time spoke of what was recognized as a retail sale in the particular industry, we felt confident that Congress had at last given us some legislative guide that was entirely in conformity with the position we had taken with the Department of Labor since 1938. We felt that there was no question as to what—what was a retail sale in the tire industry.

Q. Yes. Now, then, how was it that, as to what you understood the legislative history and antedating law, how was it that the Wage and Hour Administrator was to develop this industry recognition which had been introduced into the law in 1949?

A. Well, it was our understanding that following the passage of the law the Wage and Hour Administrator was going to attempt to determine by investigation in  
418 the various industries what a particular industry considered as a retail and a wholesale sale.

Q. Yes. In point of fact, were any investigations or studies of that sort made shortly after the effective date of the '49 amendment as regards the tire industry and its practices?

A. You mean by the Administrator?

Q. By the Wage and Hour—

A. As far as we know, none.



*Testimony of Walter E. deBruin*

Q. Do you recall or do you have anything in the file from your file or documents with you to indicate when the first inkling was of an investigation or study by the Wage and Hour Administrator with regard to this qualification under this industry recognition test?

A. Yes. I followed this weekly through the Labor Reports and through Congressional reports from the passage of the Act to see what might be forthcoming that would be of assistance to us in our industry, and the first note which I have in my file was taken from the Wage-Hour Administrator's 1953 Annual Report to the Secretary of Labor.

Normally we get those reports, but I had not received this report as of the date I saw this memorandum.  
419 I noticed the memorandum report in a Wage and Hour report, the BNA Service, dated January 25, 1953, and it indicated that the Wage-Hour Administrator in his annual report to the Secretary of Labor had referred to the fact that it was his obligation to make an investigation in the various industries, and that serious difficulties had been encountered in determining just in a particular industry what a retail sale was.

And then a paragraph which the BNA report of January 25th quoted from the Wage-Hour Administrator's report caught my eye.

Q. Would you read that for us, please?

A. (Reading) "In such industries clear lines of demarcation between sales which are recognized as retail and sales which are not so recognized often do not exist, or if they do exist, are not readily ascertainable. In such cases determinations can be made only on the basis of careful and extensive findings of fact relating to the entire industry. Even on this basis, however, it is recognized that the lines drawn may only be approximate. Progress has been made in completing industry studies and for-

*Testimony of Walter E. deBruin*

420     mutating determinations in a number of such industries, including automobile, coal, farm implements, farm feed, ice, stationery, and tires."

Q. Speaking of this.

A. (Continuing) "Additional work remains to be done, however, before the determinations can be issued."

That is the end of the quotation.

Q. I take it that it was the mention specifically of tires, of course, that caught your eye?

A. Yes.

Q. And the document is the transcription of that, of the memorandum, is that correct?

A. Right.

Q. Would you make that an exhibit to your testimony, please, sir?

(Thereupon said document was accordingly marked as Defendant's Exhibit G, and same was filed among the exhibits in the cause.)

Q. Now, then, Mr. deBruin, that which has just been marked Exhibit G mentioned that some progress had been made by the Administrator, or some steps, at least, had been taken, or words to that effect, in relation to the tire industry, along with the coal and ice and farm implements and other kind of industries.

421     Had you been aware of that at all?

A. No.

Q. Had you been informed of any studies?

A. No.

Q. Or investigation?

A. No, neither I nor, I determined by subsequent conversation with representatives of the other three rubber companies, no one of us had even known that there was an investigation going on.

Q. Yes. And from the list of industries mentioned in what is now the Exhibit G, is there any pattern of activi-

*Testimony of Walter E. deBruin*

ties of sales that follow or duplicate each other in those named industries, coal and farm implements and tires?

A. I am not particularly aware of consumers' practices in the other industries, but it did not seem to me that there was particular relationship between those other industries and the rubber industry.

Q. Now, as a result of having become aware of this 1953 Annual Report by the Wage and Hour Administrator in which a study of the tire industry was mentioned, did you take any steps to prepare for such study or to offer what you thought was the industry's obligation, perhaps, in connection therewith?

422 A. Yes, I did. I discussed with Mr. Henry Brainard, an attorney representing Firestone, and Mr. George Kilmon, an attorney and I think Assistant Secretary of B. F. Goodrich Company, also talked to Mr. Ray Shaffer, General Tire Company attorney.

As a result of our conversation, Mr. Kilmon got in touch with Mr. Goldberg—Mr. Joseph Goldberg, a representative of the Department of Labor, and indicated to him our interest and our willingness to cooperate in any study of the rubber industry practices.

Q. Could you give us the date of the letter of communication to this Mr. Joseph Goldberg of the Wage and Hour Administrator's office?

A. Yes. There was no letter to Mr. Goldberg. Mr. Kilmon had another matter before Mr. Goldberg in Washington at that time, and my notes indicate that Kilmon talked with Mr. Joseph Goldberg at the Department of Labor and indicated the industry's interest in any such hearing on March 3, 1954. And in my file I have a copy of a letter which Mr. Kilmon received back from Mr. Harry Weiss of the Department of Labor under date of March 31, '54, in which Mr. Weiss for the Department of Labor invited the interest of the tire industry.

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423 Q. Yes. Did that letter from Mr. Weiss dated March 31, 1954, refer to any prior or continuing studies by the Wage and Hour Administrator of the tire industry?

A. I have a copy of that letter here.

Q. Well, would you make it perhaps an exhibit? We will just make it an exhibit.

A. I will be glad to.

Mr. Mitchell: An exhibit to your testimony. I think that will be Exhibit H.

(Thereupon said document was accordingly marked as Defendant's Exhibit H, and same will be found among the exhibits in the cause.)

Q. Thereafter did the attorneys for the four tire companies in Akron confer about this invitation to submit information to the Wage and Hour Administrator's office?

A. Yes; yes, sir.

. . . . .

426 Q. Now, then, after this invitation from the Administrator's office in March, I think you indicated, Mr. deBruin, that there were conferences held. Did one of the members or one of the attorneys there in Akron advise Mr. Weiss on or about April 8, 1954, of the intention to submit the memoranda which would set out the industry classification or recognition of retail sales and other pertinent matters?

A. Yes, Mr. Kilmon, the Assistant Secretary at Goodrich—

427 Mr. Mitchell: Yes.

A. (Continuing) —wrote Mr. Weiss—

Q. Wrote Mr. Weiss?

A. —to that effect.

Q. And then, thereafter, do you have a letter from Mr. Weiss dated April 16, 1954, which indicates that they would like a joint memorandum from the tire industry

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attorneys more promptly than previously planned or intended?

A. Yes, I have a copy of letter, sir, from Mr. Harry Weiss to Mr. G. T. Kilmon under date of April 16, '54.

Q. Would you make that an exhibit, please, sir?

(Thereupon said document was accordingly marked as Defendant's Exhibit 1, and same will be found among the exhibits in the cause.)

Q. Now, pursuant to the letters already in the record and discussion back and forth in Akron, in July '54, was a joint memorandum prepared on behalf of the four tire companies in Akron and submitted to the Wage and Hour Administrator's office at Washington?

A. Yes, sir.

428 Q. Do you have a copy of that joint memorandum with you at this time?

A. Yes, sir.

Mr. Ray: Just a minute.

A. (Continuing) I believe I have a copy of the memorandum. Yes, Mr. Mitchell, I have in my hand a copy of memorandum by B. F. Goodrich, Goodyear, General and Firestone of what is recognized as retail sales in the tire industry. Attached to this memorandum were exhibits from each of the four companies. That was submitted—I don't have the date; it was sometime about mid-June, I believe, or mid-July, 1954, to the Wage-Hour Division.

Q. Would you make that an exhibit. First, would you refer to the conclusion, I believe, there of that memorandum and state what the definition is for retail sales classification, or retail sales, as it appears there in that memorandum expressing the opinion of the four signatories on behalf of each of their companies?

A. Yes, in that concluding paragraph we said:

"We further submit that for more than twenty years

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the tire industry has uniformly recognized that sales for resale are wholesale, and that sales of tires to consumers are retail irrespective of the character of the purchaser, the use to which the tires will be put, the quantities purchased, or the price paid for such tires. This uniform recognition antedates the passage of the original Fair Labor Standards Act, continued after the passage thereof and up to the time of the 1949 amendments, and has continued since such amendments to the present time."

Mr. Mitchell: Would you have that marked, please, as Exhibit J?

(Thereupon said document was accordingly marked as Defendant's Exhibit J, and same will be found among the exhibits in the cause.)

Q. Now, then, you mentioned that accounting records and documents were——

First, I think copy of this '54 memorandum that is now in the record is not signed. It goes without saying of course, that that is a copy. The original was signed by each attorney?

A. The original was signed by each of the attorneys whose names appear on it.

Q. And were there, as mentioned in that memorandum itself, were there exhibits made and attached to it which were comprised of accounting documents, particularly with regard to store operations for each of the four companies identified in that memorandum?

A. Yes.

Q. Do you have the exhibit that was attached to that memorandum by you on behalf of the Goodyear Tire & Rubber Company which sets out its accounting forms and a note or two about its accounting practices?

A. Yes, it is in the Goodyear exhibit.

*Testimony of Walter E. deBruin*

Q. And does it contain things exemplifying the definition of retail sales which I just asked you to read from the conclusion of the memorandum?

A. Yes, we pulled from our records as much as we could of various original documents. I think the earliest goes back to '34, and continuing right on up to the date this agreement was submitted.

Mr. Mitchell: Yes.

A. (Continuing) It demonstrates that.

Q. Would you make that which was an exhibit to your '54 joint memorandum now as exhibit to your testimony?

A. Yes.

(Document examined by counsel.)

(Thereupon said document was accordingly marked  
431 as Defendant's Exhibit K, and same will be found among the exhibits in the cause.)

Q. Now, then, Mr. deBruin, we have already taken the deposition of representatives of the other three tire companies. I will ask you to refer to them and to the exhibits attached to those depositions. And first I hand you the deposition to Ted Curry, an executive of B. F. Goodrich Company, not yet read in this record, but I want you to refer to the gray-bound Exhibit number 5 to Mr. Curry's deposition and tell me whether or not—just that one—whether or not that Exhibit number 5 to the Curry deposition is the accounting exhibit that was attached to the joint memoranda in 1954 which now is made Exhibit J to your own testimony.

A. I believe it to be.

. . . . .

434 Mr. Ray: There is really no issue about what the industry's position is, Your Honor. We are not claiming there is not.

Q. Mr. deBruin, will you further identify this which has been made Exhibit 1 to the Zaveson deposition as



*Testimony of Walter E. deBruin*

having been an additional exhibit attached to and filed with the joint 1954 memorandum to the Wage and Hour Administrator?

435 A. I believe it to be.

Q. And with respect to the Hinderscheid—H-i-n-d-e-r-s-c-h-e-i-d, would you identify the exhibit to that deposition in the brown cover entitled Firestone Exhibits to be the fourth accounting records that were attached as an exhibit to the '54 joint memorandum?

A. I believe it to be.

Q. Now, Mr. deBruin, after the '54—in '54—the joint memorandum and the four accounting exhibits you have just identified, one from your own company, one from each of the other three Akron companies, around in July of '54, was there any action or any activity on the part of the Wage and Hour Administrator with reference to inviting conferences and doing anything about a study of the industry's practices with respect to the tire industry?

Mr. Ray: If he knows.

Mr. Mitchell: What about—?

Mr. Ray: If he knows or not.

Mr. Mitchell: Well, was communicated to him or he was made aware of it.

A. We heard nothing from the Wage and Hour Administrator's office following submission of our joint brief until June 12, 1958.

. . . . .

436 Q. Now, then, Mr. deBruin, you indicated that in June of 1958 you were made aware of some action on the part of the Administrator with respect to an industry study on retailing of tires?

A. Yes.

Q. How did that come to your notice, and what was the date?



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A. Under date of June 12, 1958, I received a letter from William B. Grogan, Assistant to the Wage-Hour  
437 Administrator, enclosing copy of proposed determination which he said had been published in the Federal Register of June 6, 1958, and indicated that interested parties had thirty days to present any data, views or arguments to the office. He also attached copy of press release.

Q. Would you make copy of the Federal Register, which I believe you have there, and Mr. Grogan's letter Exhibit P, I think it will be?

A. This is Federal Register of Friday, June 6, 1958, photostatic copy of which was attached to Mr. Grogan's letter of June 12.

Q. All right. Would you make that cumulative Exhibit P, please?

(Thereupon said documents were accordingly marked as Defendant's Cumulative Exhibit P, and same will be found among the exhibits in the cause.)

Q. On reading the proposed regulations as appeared in June, 1958, did it appear that the Wage and Hour Administrator had given any consideration or taken into account the industry's viewpoint in preparing such proposed regulations?

A. No, there was no such indication.

438 Q. What next did you or did the Akron tire company attorneys do about this matter?

A. The four attorneys representing the four companies that had been parties to the original memorandum wrote a letter to William B. Grogan under date of July 2, 1958. I have a copy of that letter here.

Q. What was the purpose, to request a conference, or what?

A. Yes, we requested that before a determination was made a conference of the interested parties be held with

*Testimony of Walter E. deBruin*

the Administrator to consider the data, views, and arguments which we had presented.

Mr. Mitchell: Yes.

A. (Continuing) —which we were presenting.

Q. And in response to that letter and in connection therewith, was there such conference held in Washington on or about September 4, 1958?

A. Yes.

Q. Could you tell me from notes or memoranda in your file the outcome of the conference or what action was taken at that time?

A. Yes. Mr. George Kilmon, representing Goodrich, Mr. Harold Mull, who was a replacement for Mr. 439 Henry Brainard at Firestone, Mr. Ray Shaffer and I met Mr. Joseph Goldberg at his office at the Department of Labor on Thursday, September 4, 1958. Mr. Goldberg had with him an associate, a Mr. Jacob Rubenstein, Mr. Harry A. Tuell, solicitor for the Department of Labor, I believe, at that time, and Mr. Hammerman, who were all participants in our conference.

Q. And were the proposed regulations that had appeared in the Federal Register in June, 1958, discussed at this conference between the tire manufacturing representatives and the gentlemen from the Wage and Hour office you have just named?

A. Yes.

. . . . .

446 Q. Will you make the memorandum, since we don't want to go into the details, but so that we can have them available—make your memorandum of this September 24, 1958, meeting at Washington an exhibit to your testimony?

A. This is my notes.

(Thereupon said document was accordingly marked as Defendant's Exhibit Q, and same will be found among the exhibits in the cause.)

*Testimony of Walter E. deBruin*

447 Q. Now, then, after you have had the conference in September, 1958, in Washington, did the four attorneys for the tire companies with their main office—home office in Akron submit a further joint memorandum in letter form dated on or about October 9, 1958?

A. Yes.

Q. Does that reaffirm or express again the industry's recognition of retail sales and a re-conveyance of the need for the Administrator to observe same in amending his proposed regulations?

A. That is true.

Q. Will you make that an exhibit to your testimony?

A. This is the exhibit—

Q. And that which you made joint letter memorandum of October 9, 1958.

A. Yes.

. . . . .

450 Q. All right. Now, then, after submitting what now is Exhibit R to your testimony, the joint letter of October 9, 1958, that you just detailed along, I believe you got an acknowledgment of that joint letter, then, about October 21?

A. Yes.

Q. (Continuing) From someone on the Wage and Hour Administrator's staff. And then from a Clarence Lundquist you received a letter, did you not, dated November 25, 1958?

A. Yes.

Q. Does that identify what title Mr. Clarence Lundquist then had with the Wage and Hour Administration, sir?

A. Yes, he was Administrator.

. . . . .

451 Q. The Department of Labor there, and under date of November 25, 1958, and signed Clarence Lundquist, and I think—I believe it is typed on the paper

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below that he is Administrator, is that correct, Mr. deBruin?

A. Yes.

Q. The letter, then, speaks for itself. And would you make it Exhibit S, I believe?

A. This is that letter.

(Thereupon said document was accordingly marked as Defendant's Exhibit S, and same will be found among the exhibits in the cause.)

452 Q. Now, then, Mr. deBruin, after receiving the letter in November, '58, from the Administrator of the Wage and Hour office, was any further request made for information from the tire companies through their attorneys, or any further conferences held, or anything else done in connection with the proposed regulations concerning tire retailing by the Wage and Hour Administrator's office?

A. I heard nothing further from any representatives of the United States Department of Labor until February 25, 1959.

Q. What then occurred?

A. (Continuing) At which time I received a letter signed by Duane A. Wendele, W-e-n-d-e-l-e, and the title indicated that he was acting administrator. The letter merely enclosed for my information a copy of the determination on how the minimum wage and overtime exemptions for retail and service establishments applied to the automotive tire trade and said these are regulations that had been published in the February 25, 1959, Federal Register and would become effective on March 28, 1959.

Q. Would you repeat the effective date, please?

A. Said they would become effective March 28, 1959.

453 Q. Would you make that letter and the attached photostatic copies about the matter published at that time an exhibit to your testimony?

*Testimony of Walter E. deBruin*

A. This is that letter. This is it.

(Thereupon said documents were accordingly marked as Defendant's Composit Exhibit T, and same will be found among the exhibits in the cause.)

Q. Now, then, Mr. deBruin, the regulations which appeared in final form in 1959, were, I am sure, compared by you, were they not, with the proposed form of those regulations as appeared in June of 1958?

A. Yes.

Q. Did you notice any changes of any substance or any marked degree?

A. No, sir.

Q. Do those regulations as they appeared in 1959 in final form reflect that any consideration or attention had been given to material offered by you, through you and on behalf of the four tire companies in Akron?

A. No, no attention at all had been paid it.

. . . . .

454 Q. All right, if that is done, may I ask, Mr.  
deBruin, did you find the adaptation of any lan-  
455 guage or any definition in the regulations as they  
appeared in early 1959 in final form of anything  
you had submitted to Labor Department there prior  
thereto?

A. Nothing that we had submitted had been used.

. . . . .

457 Q. Will you state what the industry recognition is?  
You say it as you know it, according to what you  
say it is, of a retail sale. What does that classification  
include?

A. From my experience, a retail sale in the tire industry is a sale for use.

*Testimony of Walter E. deBruin*

Q. Then any other kind of sales made by persons who sell the tires, then, according to the industry's recognition—then do they make two classes, say one of uses and another kind?

A. Yes, for resale.

Q. Are those the only two classifications that are recognized in the industry, as you understand it?

A. Yes, that has been traditional in the industry.

Q. Now, with regard to national account, if you  
458 will, please, Mr. deBruin, according to what you know and understand of the industry's recognition, is the national account transaction a sale at the retail level, that is, by the store that makes the delivery of the merchandise?

A. Well, no, we have never considered the account—well, let me put it this way. If I understand the practice, the practice where the national account operates, and the transaction is handled from the home office of the company with the national office of that account, under most circumstances never involves the retail store at all except as a matter of service, and we have never considered that as actually a sale by that retail store at all. It is a service. And I think under most circumstances the only time the retail store is involved in that and the only compensation they get from it is a percentage for the service which they furnish, not the sale at all by the retail store—never goes through their books, as I understand.

Q. And was this percentage—this discussion of this recognition of the national account transaction by the industry made clear to whomever you conferred with on behalf of the Wage and Hour Administrator in this memorandum in 1954 and in the additional memorandum in 1958 and in the conferences held in '58 in Washington?

*Testimony of Walter E. deBruin*

459 A. Yes, particularly in the September, '58, conversation we pointed that out so far as the national account deal was concerned.

Mr. Mitchell: Thank you, sir.

**Cross-Examination,**

By Mr. Ray:

Q. Mr. deBruin, is it fair to say, in summary of what you have said, that long, patient, time-consuming and courteous consideration was given by every person in the Labor Department with whom you dealt concerning the problem that they were then faced with to come up with the interpretation of the terms involved in this particular exemption?

A. Is it fair to say that that is accurate. No.

Q. (Continuing) —what I have just said?

A. No, I don't think it is fair to make that interpretation of it at all.

Q. Well, is it fair to say that time-consuming and lengthy consideration was given to the views submitted by the representatives of the tire industry to the Labor Department?

A. I don't believe so, sir. My interpretation was that no consideration or attention at all was ever given to any views that we expressed.

460 Q. Well, are you influenced by the results rather than whether or not consideration was given or not? In other words, was the test whether consideration was given, whether agreed to or not? I am not sure we can agree with you or not. I am speaking about the fact that whether they listened to you, they responded to your inquiries and spent enough time on a particular problem. You will concede that, won't you?

A. Mr. Ray, I want to be fair in my answer, and it may

*Testimony of Walter E. deBruin*

involve some conclusions; if you want me to tell you why I arrived at my conclusion that the Labor Department never gave any particular consideration to any material we submitted I will be glad to, but I don't want to offend the Court.

Mr. Ray: I don't want you to.

A. (Continuing) If you want an explanation of my feelings, I will be glad to give it.

Q. No, I am talking about testimony you might have—

A. Yes.

Q. And it seems clear from your testimony, the correspondence and letters here which you have available, the fact that they always answered yours, and say that  
461 they will be glad to have any facts that you will submit, item of correspondence after correspondence—and his Honor has seen it, too—they gave lengthy and time-consuming consideration to you, to the views of the industry representatives, as you understand it?

A. No, I don't think they gave any consideration. I will be glad to elaborate and tell you why I reached that conclusion, if you want me to, because I don't think they gave any consideration to anything on file.

Q. Have you read the deposition of the executive secretary of the National Tire Dealers Association?

A. No.

Q. You have not?

A. I haven't read any of these depositions except one of Mr. Davis from Goodyear. I did read that.

• • • • •



*Testimony of Winston W. Marsh*

464      **DEPOSITION OF WINSTON W. MARSH.**

. . . . .

465                      **WINSTON W. MARSH,**

was called as a witness by counsel for the defendant, was duly sworn by the notary public, was examined, and testified as follows:

**Direct Examination,**

By Mr. Mitchell:

“Q. Would you state your name?”

“A. My name is Winston W. Marsh.

“A. Mr. Marsh, are we taking this deposition this morning in the Board Room of your offices of the National Tire Dealers and Retreaders Association at 1343 L Street, Northwest, in Washington, D. C.?”

“A. That is true.

“Q. Would you state, sir, what your position or title with that Dealers Association may be at this time?”

“A. My title is Executive Secretary and General Manager.

“Q. Would you state briefly, sir, what your duties and responsibilities in that position generally consist of?”

“A. I am the chief administrative paid staff member. As such I am not an officer per se of the Association, and my responsibilities include the administration of this office, the development of services for our tire  
466 dealer membership and a responsibility to our Board of Directors and Executive Committee to carry out such interests as they may find kindred with their own particular businesses.

“Q. Would you summarize briefly, sir, what your education at the college or graduate level may be, bearing particularly in mind our interest in business and on management studies?”

*Testimony of Winston W. Marsh*

"A. At college and graduate level?

"Q. Yes.

"A. I have an A.B. degree from Wittenberg University, Springfield, Ohio. I have done some extension work beyond that; Master of Business Administration, George Washington University, here in Washington.

"Q. Now, sir, the case in which your deposition is being taken this morning concerns a tire dealer who does some retreading and has been and is in the tire business at the merchandising level.

Would you summarize, again fairly briefly, what your background and experience your various positions may have been in the tire industry, and particularly in the merchandising of tires, prior to your coming to this Trade Association?

"A. I started in the tire business in 1930 with an independent tire dealer in Springfield, Ohio. I left  
467 them in something less than a year to join the Firestone Tire and Rubber Company. I was employed for some four years working as a store manager and as a field representative.

"Q. May I interrupt please, sir? When you say store manager, does that mean a retail store?

"A. A retail store manager.

"Q. Controlled by your employer, Firestone Tire and Rubber Company?

"A. Yes. Actually, it was in the department store field.

"Q. Thank you, sir.

"A. That was followed by about three years with the Texas Company. At the time I left I was a retail supervisor in charge of company stations as well as some wholesale accounts.

Following that I went to work for the General Tire and Rubber Company, and was a special representative

*Testimony of Winston W. Marsh*

in the Stores Division, helping stores that were having difficulties.

“Q. Would you state, sir, how long and over what territory your employment by General Tire and Rubber Company consisted?

“A. I think I was at General about two years, and I worked principally—well, I worked out of Akron and Mansfield, mostly out of Akron though.

I followed that by going into business for myself, 468 first for two years in Dayton, Ohio, followed by some ten years in Hamilton, Ohio, and maintained my interest in the tire business up until September of 1950.

In September of 1949 I divorced myself from active interest in the tire activity in Hamilton to come here as General Manager of the Association.

“Q. Just for clarification, you indicated your interest as a proprietor of a tire dealership continued until September of 1950. Am I accurate in thinking that was for one year after you ceased to be actively engaged in that business?

“A. That's exactly right. It was for one year after. It was simply a matter that I came down here not sure of whether I was going to stay. Then there was also the problem of disposing of the business.

“Q. Surely. Then, since your appointment to the position of Executive Secretary of the National Tire Dealers and Retreaders Association in September, 1949, would you outline very briefly the growth and development of that association under your leadership?

“A. Well, membership-wise we are about two-and-a-half to three times larger now than we were at that time. We have purchased this building here and 469 moved in here some two years ago. We operate now in all fifty states and sixteen countries. We

*Testimony of Winston W. Marsh*

have a staff at the present time of some twenty-one persons, having started with four. There are many ramifications of the Association's operations which have grown in the field of services and publications, and that sort of thing.

"Q. In addition to your full and regular employment as Executive Secretary and office of this Trade Association, do you find time for teaching or for writing or for appearances as a speaker or in other such activities in the tire industry?

"A. Well, sir, this is a pretty busy schedule, but this seems to be very much a part of my activities, and I would guess that I make from fifty to one hundred speeches a year, most of which are within the industry. However, I feel that I have some responsibility outside the industry and so I have made a number of presentations outside the industry and have done some writing outside the industry.

"Q. Have you been able to continue with the academic end of the management field; particularly, do you hold a title on any school or graduate school faculty?

"A. Well, I have done some university lecturing and have functioned under an Associate Professor status  
470 at George Washington University and have probably lectured at some six or seven universities throughout the country.

"Q. You have an Associate Professorship at George Washington University. Is this department you work in located here in Washington, D. C.?

"A. Yes, it is. It is principally confined to the School of Government which is their School of Business.

"Q. You mentioned that you made a number of speeches or addresses in the industry. I will ask you if you have ever been called upon as a management consultant by persons or agencies outside the industry for your

*Testimony of Winston W. Marsh*

appearance or consultation, and if so, when and under what circumstances?

“A. Well, there have been a few. I think around, oh, five or six years ago I flew to Anchorage, Alaska, to be some service to the Air Force in a management program for their officers of the rank of Major and above.

I have also performed in this capacity with other trade associations in other small business groups.

“Q. Have you ever appeared at international conferences in respect to tire merchandising, and if so, would you tell us some of the details of that experience?

“A. Well, in 1957 I believe it was, the Dutch Government paid my way to come abroad as consultant and discuss with them some of their industry problems, 471 and at the same I addressed the International Conference at Baden Baden, Germany. In 1960 I repeated the latter part of that experience by addressing the International Conference at Vienna, Austria, and I have been invited back to Essen, Germany, in May of this year.

“Q. What about publications, sir? You already enumerated a very busy schedule, but have you had an opportunity and have you in fact published some material on the field of tire merchandising or certain aspects of it?

“A. Well, I have written quite a number of articles and trade papers as it specifically relates to tires and tire selling, merchandising and management, and in my capacity here I am called upon to write a great deal of this type of thing. Outside interests have been on a little broader scale and I have contributed to three different books and written one article for the Dartnell Corporation.

“Q. Would you describe what sort of reporting this Dartnell Corporation is engaged in?

*Testimony of Winston W. Marsh*

"A. Dartnell is, I believe, properly described as a management publication firm which publishes technical manuals. The work I did with them offered sales work at various levels, and part of my research I had done within the industry and part outside.

472 "Q. Have you had other publications in general as opposed to trade magazines or journals?

"A. Oh, actually they are relatively minor roles. There was a publication by the Oklahoma Press that I can recall, and Small Business Management, and I think there has been one or two more. It has been sometime. I am working on one now. This is a matter of most pertinent interest at the time. I can't confess much progress, but we are working on it.

"Q. Now then, sir, are you a member of any professional or service organizations in the management field, and if so, would you tell us what those may be?

"A. I am a member of the American Management Association; the American Institute of Management; the American Marketing Association, I am a past-president of the Washington Chapter of that group. I am a member of the American Society of Association Executives. I believe that covers it.

"Q. All right.

Mr. Marsh, will you tell us something about the background and history of the National Tire Dealers and Retreaders Association, Inc., and first let's start with its organization date?

A. This organization started in Cleveland, Ohio, in 1921.

473 "Q. During the course of its history and development has it broadened its area of membership and operations and changed its name in connection with such broadening?

"A. Well, technically, it has never broadened its

*Testimony of Winston W. Marsh*

interest. It is still representative of the same group of people, of the same type of merchandisers and merchants as it was then at its outset, although in the course of these years it has changed its name several times, once to include batteries, which was later dropped.

The most recent change was made in November of 1955 when the name which had been one of some standing, the National Association of Independent Tire Dealers, was changed to include the word Retreading, and to keep the name short the word Independent was dropped and the word Retreaders was added to our present name of National Tire Dealers and Retreaders Association.

However, I want to quickly point out, as I do in every case, that this in no way prejudices the group of people we represent. We are still the Independent Tire Dealers.

“Q. And has the continuity of the Association been the same, that is, is the present entity under the present name, National Tire Dealers and Retreaders Association, Inc., a successor to and a continuation of the identical association that formerly was known as the National Association of Independent Tire Dealers, Inc.?”

“A. That is definitely true. We are a New York chartered Association; it's been continued in exactly that same area.

“Q. Are there other trade organizations that represent tire dealers in this country on a national basis?”

“A. We purport and I believe do singularly represent the independent tire dealers of the United States.

“Q. You have already indicated that the membership includes dealers in all of the present fifty states of the United States and several foreign countries. Would you tell us approximately what the enrollment or membership is?”

“A. In our tire dealer membership we have some 3200 members. We have an associate type of membership in



*Testimony of Winston W. Marsh*

the equipment industry which numbers approximately 200, for a total of 3400.

"Q. Now then, sir, as used in the Association, what does this term Tire Dealer in its title or name convey or mean?

"A. This term to us would identify an individual or partnership or corporation whose principal interest would be in the sale of tires. Now it would, of necessity, also embrace those people who would have a very deep, broad interest in the tire industry which might not  
475 in the full sense number tires at fifty-one percent or more of their sales.

For example, a petroleum jobber might do a million dollars in oil and gasoline sales and only \$300,000 in tires. We would still consider him a very formidable outlet or distribution point for tires. So at the risk of over-simplifying it, I would say that it is someone who has a principal or deeply vested interest in the distribution of tires.

"Q. Now the term retreaders, as I understand it, in your industry, has a particular connotation, and I want to ask whether or not the term, the word retreaders, as it appears in the title of your Trade Association, is used in the general sense to include those who retread or recap or otherwise rebuild tires and not in a particular specific meaning?

"A. Mr. Mitchell, we have made a bit of ado over the thing of the word retreader because we were trying to get rid of the connotation of recapping as was known in World War II when we had dubious materials to work with and so had a great deal of a problem trying to keep America's vehicles operating. But in the full sense of the word, retreading, as such, embraces all of this industry whether it be recapping or any other  
476 name which might be applied to it.

"Q. I have noticed from your testimony about the



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change of name which I think you placed sometime in 1956, and the dropping of the word independent from the title of your Trade Association; my question is: Does that signify a change in the type of membership that was enrolled or a change in attitude or policy of the Trade Association, or was it simply for brevity and utility?

"A. It represented no change of interest in the least. The changes made in early November, 1955, are the same, and our membership today is as it was then, for the independent tire dealer. Any man controlled by a rubber company is not eligible to membership, and each one of our directors, before being seated as a director, must have a sworn affidavit to the effect that he is an independent tire dealer.

"Q. And as you just stated, I take it the words independent tire dealer is used to distinguish those dealers who are not controlled by a rubber manufacturer from company owned or operated stores?

"A. That is true.

"Q. Would you please name and briefly outline some of the services and functions of this Trade Association by or for its membership?

477 "A. The area of service that we render our membership is broad. In many respects it's probably much broader than the average Trade Association. We find the needs of our membership to be many, and to be brief, I will try to put them in general categories.

First might probably well be the field of management where we are trying to improve the management quality of the independent tire dealer, and have done so by extension schools which we have provided at four levels of teaching. We have an advanced management seminar for tire dealers that is sponsored by the Wharton School of Finance at the University of Pennsylvania. This past

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year we had two schools, one at the University of Georgia, and the other one at U. C. L. A. This year there will be put on right here in Washington a training program by the American University.

In the third area we have put on some fifteen to eighteen area or regional type of meetings in which a very broad number of activities are covered at these meetings. The fourth area is a shop training program which is a mobile thing moved from one part of the country to another as the need arises.

We are quite active in the field of publications and  
478 have divided our publications into five areas which are, sales, service, shop, warehouse and office, and have published three technical manuals in this field. One that has already been published is in the field of shop procedures or retreading; the second in the field of warehousing tires; and the third in the field of office procedures, and this one has just been released this week. We have published other technical manuals of this type too.

We have published a number of assistants to retreaders in the form of technical bulletins and cost analysis documents whereby he can analyze the cost of his shop operation. We have an inventory control system that we tell about. And these are specifics and things that are tangible.

On the other side we have tried to keep our people familiar with what is going on in the industry, with changes, whether they be technical or just changes in marketing patterns within the industry. And several years ago we created a market research department to assist us in this, and we now have a full-time man whose job it is to keep our people, our members, familiar with what is going on in the various departments of Government so that we can acquaint our dealers with the regu-

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lations of the various agencies and departments,  
479 and to keep them on the right basis of doing  
business, and of course, involved with all of this  
is a certain amount of legislative interest as far as certain  
bills and matters before Congress are concerned.

“Q. In addition to the particular seminars and advanced study groups and what not which you have already described, I take it there are as well periodic meetings for the membership in regions, districts, or perhaps on a national basis.

My question is: At those meetings, is this education and instruction and keeping the membership up-to-date also carried out?

“A. Well, I am quoting these figures off the top of my head, but in this past year at our convention, at our annual convention, we had 5,600 people. At our regional meetings last year we had something less than 2,000. At our advanced seminars we had something like 200, and at our retreader training schools we have probably had 150, which totalled up makes a rather broad area of contact with our membership.

And while the training school program is dedicated to shop procedures, the other four programs, however, do cover a very broad area of interest, whether it be a new system, a better way of keeping records, or  
480 new management procedures, or new income tax requirements covered this past year, so we do try very desperately to keep our members as fully informed as we can.

“Q. Mr. Marsh, would you state please, sir, how sales are classified in the tire industry and particularly in your Tires Dealers Association with regard to retail sales and non-retail sales, and what goes into each category?

“A. Would you repeat that question again?

“Q. Yes, sir. I am asking for a classification of sales

*Testimony of Winston W. Marsh*

in the tire industry as recognized by your Trade Association of tire dealers as to retail sales and non-retail sales, and the components or constituents of each class.

"A. Sales are basically divided as either retail or wholesale, and in the terminology in general usage in the tire industry a retail sale is a sale made to a consumer or user, whereas a wholesale sale is a sale made to someone who intends to use these products for purposes of resale.

"Q. Now then, in line with that classification I take it by your statement that all sales are broken down into two categories, either retail sales, which are those to consumers or users, and wholesale sales which are those for resale; is that correct?

481 "A. I am not sure that every tire dealer breaks that down in these two ways, but I would say that in general usage that these would be very accepted procedures by the average tire dealer.

"Q. Now then, in connection with the sales that are classified as retail sales, namely those to consumers or users, I will ask you whether or not other factors such as the volume of the sale, the repetition of sales to the same purchaser, the discount at which the sale may be made, the character or personality of the purchaser, I will ask you whether or not any of those factors enter into the classification of a sale as a retail sale.

"A. Well, in my opinion, this would have very little effect on the tire dealers' classification of the sale because in the majority of the States in the United States, they must classify a sale to a user for sales tax purposes, so as a result it is a very natural thing for him to consider that a sale that he makes, regardless of discount or price or quantity or anything else, either goes to a user who must pay tax, or to a wholesaler who would be, therefore, tax exempt and would qualify with some exemption certificate.

*Testimony of Winston W. Marsh*

“Q. And would you state, please, sir, whether or not this classification for sales tax purposes that you  
482 have mentioned does or does not duplicate the classification in the tire industry apart from the sales tax laws?

“A. I suppose in the full sense of the word this is true. It is hard to say which came first. I would be inclined to think that the tire dealers’ analysis of it came first and sales tax analysis of the various States came second. Regardless which was the primary motivating force here, this is pretty deeply imbedded in the minds of the tire dealers.

“Q. Would you state what the term ‘retail establishment’ means in the tire industry and particularly as used by your own Trade Association.

“A. Well, with very few exceptions, and I emphasize very few, I would consider the great bulk and majority of our membership to operate retail establishments inasmuch as they offer tires for resale and therefore I would logically assume, I believe, that they would therefore be retail establishments.

“Q. I believe your statement was that they offer tires for resale.

“A. At retail; I’m sorry.

“Q. So that your statement as you intended to make it was that since they offer tires at retail—

483 “A. Tires at retail.

“Q. That is the classification of a retail establishment according to the context of your answer?

“A. Yes, sir.

“Q. Mr. Marsh, you indicated a short while ago in your testimony that one area or aspect of your Trade Association’s service to its membership was keeping posted on legislation or bills, and trying to inform the members as to the regulations or directives by the various

*Testimony of Winston W. Marsh*

agencies of the Federal Government which might or could affect tire dealers.

I will ask you whether or not, sir, in connection with that, this Association entertained an interest in and participated in any way in respect to the 1949 Amendments to the Fair Labor Standards Act.

"A. Well, I became acquainted with this Amendment almost from the first day I came here, having arrived here in September of 1949 I found myself faced with this problem not many months afterwards, and it was probably one of the first, if not the first, matter of Government activity to which we addressed ourselves.

484 "Q. And in that connection, sir, I will hand you a letter which is a copy from your file, apparently, which went out over your signature to the Administrator, Wage and Hour Division, Department of Labor, Washington, D. C., under the date February 21, 1950, and ask you if you identify this as a true copy of a letter that you wrote on the subject of the Fair Labor Standards Act or the Wage and Hour Law?

"A. Yes. This is a letter from our office dated February 21, 1950.

Mr. Mitchell: I will ask that that be marked as Exhibit A to Mr. Marsh's deposition.

(Whereupon, copy of letter being 5 pages was marked Defendant's Exhibit A, for identification.)

(Defendant's Exhibit A, for identification, was thereupon exhibited to counsel.)

By Mr. Mitchell:

"Q. Now then, sir, would you glance at that as you feel the need to and tell me whether or not from your recollection that was the first communication addressed to the Wage and Hour Division in respect to the changes that had been made under the Fair Labor Standards Act in 1949 in respect to rulings or regulations which you

*Testimony of Winston W. Marsh*

considered were to be issued by the Wage and Hour Administrator?

485 "A. Well, to the best of my knowledge this is our earliest bit of correspondence on this subject.

"Q. Now then, sir, would you turn to the last paragraph, I believe it is, of that letter, and see if you find an offer in it by you to provide further information or to have conferences or do whatever the Administrator saw fit to request in line with the recommendations and requests stated in your letter?

"A. Well, in the last paragraph here we state:

"We will be glad to supply you with further information or aid in this connection."

"Q. Do you recall whether or not, sir, there was any request made in line with your offer, that is, if conferences were held or if requests for further information came back to you from the Wage and Hour Administrator within a short period of time?

"A. Well, this is going back a good many years to draw on one's memory. I believe that there were several informal office conferences in the next—shall I say several years, but I don't recall any formal activity such as is represented by this letter, for what I would call a considerable period of time.

"Q. Well, I hand you a letter addressed to you  
486 as general manager of this Association as it was then known, which has a stamp date of December 15, 1950, and is over the signature of William R. McComb, Administrator, and I will ask you if you recall receiving this and if it is your present recollection that that may have been the next document or correspondence in the chronology of this Wage and Hour ruling?

"A. Oh, yes, this is the acknowledgment. Yes, it says here:

"Already available for this purpose is your letter to me dated February 21, 1950 . . ."



*Testimony of Winston W. Marsh*

Oh, yes, I remember this. This is December 15, 1950. This is later the same year. And in this one he has some fifteen questions.

“Q. And would you have the court reporter mark this as Exhibit B in your testimony, please sir?

(Whereupon, letter of Dec. 15, 1950, addressed to witness was marked Defendant's Exhibit B, for identification.)

(Defendant's Exhibit B, for identification, was thereupon exhibited to counsel.)

487 By Mr. Mitchell:

“Q. Mr. Marsh, as you indicated and as is apparent from inspection, this December 15, 1950 letter to you from Mr. McComb, the Administrator, makes a request for answers to some fifteen questions attached to Mr. McComb's letter, with the direction that your statement of the answers should be addressed to a Mr. Max Schiferl, Acting Director, Division of Research and Statistics, Department of Labor.

I will ask you, sir, if this document that I hand you now, addressed to Mr. Schiferl, dated January 19, 1951, is a file copy of your letter in reply to Exhibit B, and if attached to it is a copy of your answers to the fifteen questions stated in the attachment to Exhibit B?

“A. Yes. This letter dated January 19, 1951, is in answer to the request shown by—I think you call it Exhibit B.

“Q. Would you have that document which you have just identified made Exhibit C in your deposition, please, sir?

“A. Yes, sir.

(Whereupon, copy of letter to Mr. Schiferl of Jan. 19, 1951 was marked Defendant's Exhibit C, for identification.)

(Defendant's Exhibit C, for identification, was  
488 thereupon exhibited to counsel.)



*Testimony of Winston W. Marsh*

By Mr. Mitchell:

"Q. Mr. Marsh, I find in the last paragraph of the letter of January 19, 1951, now made Exhibit C to your deposition, the statement:

"You can be sure that if there is further information or other material that we can bring to light which will help you, we would be pleased, not only to come to the Department of Labor for any conference that you might want held, but to develop further information which might help you get a clear picture of the retail tire industry as we know it."

From your present recollection, sir, will you state whether or not at any time soon after January 19, 1951, any such conference was held or any further information was solicited by the Wage and Hour Division in respect to the information stated in your answers attached to Exhibit C, or in respect to the tire industry in general?

"A. As I indicated earlier, we had a number of informal conferences with the Department of Labor. Some of these were conducted over telephone and some were personal conferences. However, as I indicated earlier, my recollection of any vigorous activity in this 489 area is to the effect that there was no major activity for quite sometime, possibly two, three years.

I might add, however, that in that same period of time that I do very distinctly recall that we pursued every case that we could hear of or learned about of tire dealers who were engaged in any controversy with the Department of Labor, to ascertain why, how, any of the facts that we might be able to get together to really reaffirm in our own mind that our views on this subject were proper and correct.

"Q. But while I take it from what you just said there was continuing activity by the Department against the

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individual, I take it individual members of your Association—my question actually was directed to any continuing activity of the sort exemplified by your Exhibits A and C, namely, the submission of facts in whatever form to the Department of Labor's Wage and Hour Office in Washington.

"A. To the best of my knowledge, I don't recall submitting anything in written form to the Department of Labor for a considerable period of time after that.

"Q. Can we take it from that recollection that there was no request for any further information which was denied?

"A. I fear that in answering this I would have to draw an assumption, and that is, if we had such a  
490 request we would have quickly filled it.

Mr. Ray: We will stipulate that Mr. Marsh has been very cooperative with the Labor Department in all the various facets of this problem.

Mr. Mitchell: Thank you very much. I am sure the witness appreciates that as well as myself.

By Mr. Mitchell:

"Q. Mr. Marsh, I hand you here a document which appears to be a copy of a letter over your signature dated July 30, 1954, addressed to a Mr. Harry Weiss, Assistant Administrator, Wage and Hour and Public Contracts Division, United States Department of Labor, and attached to it is a memorandum of the National Association of Independent Tire Dealers, Inc., on what "is recognized as retail sales" in the tire industry, which memorandum is dated July 30, 1954, and the copy, from the copy I hand you it appears that this memorandum also went out over your signature as Executive Secretary of this Trade Association.

I ask you if you can identify that as a true copy of the letter and memorandum described?

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"A. Before answering this, I'd like to ask counsel if I may make an addition to my earlier testimony regarding contact in these matters.

491 "Q. Oh, by all means, at this time or at any other time, if you would like to elaborate, feel free to do so.

"A. The letter of July 30, 1954, deals with the problem of retail sales as they are known within the industry, and in fairness I would like to state that to the best of my knowledge we had resolved the first part of a two-part problem, the one of the classification of retreaders, as a service, and that this was accomplished not long after the questionnaire was returned to the Department of Labor. This has been handled so long ago, and it was not a matter of great controversy. We were able to present the industry's views on retreading and they were accepted basically as they were presented, and retreading was classified as a service industry, which I believe is covered as one part of one of the earlier exhibits which I looked at.

The second part comes back here in July of 1954 and this is the additional information which we supplied on that particular problem.

"Q. Well first, before we actually identify that exhibit that you now have before you, let me make a statement for clarification, with your permission, sir, and obviously, check me if I am inaccurate.

492 Your reference to answers that you submitted to the Department of Labor was to what we now have had marked as Exhibit C to your deposition; is that correct?

"A. It was a question which was posed in the first letter of 1950.

"Q. For record purposes, can we follow that continuity through by referring to exhibits as to their letters?

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"A. It was material dealt with in part one of the letter of February 21, 1950.

"Q. Which now is marked as?

"A. Exhibit A.

"Q. And that question you say—

"A. Somewhere in this period of time, not long after this exchange of correspondence now known as Exhibits A, B and C; it was resolved somewhere in that area of time.

"Q. Right.

"A. The matter of retail sales went on in a continuing thing and comes back here in my memory of this letter of July 30, 1954.

"Q. But the first part, with regard to the vulcanizing and recapping services, was resolved prior to July 30, 1954, in some manner consistent with the Trade Association's presentation of that problem and of the  
493 nature of that problem in your Exhibits A, B and C?

"A. Well, let me answer that in two ways. One, as I recall it, it was resolved very near the date of 1951, somewhere in that area. It was early in that period of time.

Two, it was certainly resolved to our satisfaction because it was in a matter as we saw it and as we felt the industry saw it.

"Q. Right. Now then, sir, would you mark this letter and memorandum both bearing the date July 30, 1954, as Exhibit D to your testimony?

"A. Yes, sir.

(Whereupon, copy of letter with memorandum was marked Defendant's Exhibit D, for identification.)

(Defendant's Exhibit D, for identification, was thereupon exhibited to counsel.)

By Mr. Mitchell:

"Q. Mr. Marsh, I hand you a letter dated August 9,

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1954, over the signature of Verl E. Roberts whose title was Acting Assistant Administrator, addressed to you as Executive Secretary of the Trade Association, and I ask you if that is the reply to the letter and memorandum of July 30, 1954, which now has been marked as your Exhibit D?

"A. That is true.

"Q. Would you have that marked as Exhibit E, please, sir, to your deposition?

"A. Yes.

(Whereupon, Roberts letter of Aug. 9, 1954, was marked Defendant's Exhibit E, for identification.)

(Defendant's Exhibit E, for identification, was thereupon exhibited to counsel.)

By Mr. Mitchell:

"Q. In the last paragraph of the letter now made Exhibit E to your deposition, the phrase appears:

'If upon completion of our analysis, additional information or clarification is necessary, we shall take advantage of your office of further assistance.'

In view of the stipulation already of record with regard to your cooperation with the Department of Labor in respect to these regulations, I want to ask you whether or not any such request may have been made, if you remember, what conferences or discussions, if any, took place after August 9, 1954?

495 "A. Well, over the period of the next couple years there were several conferences. I am in no position to tell you how many or at what intervals they might have been. As I recall it, however, there was little activity again for some period of time, until such time as the present ruling dealing with retail sales came out, when there were several conferences held about this matter.

"Q. Do you recall, sir, about when the rulings under

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the 1949 Amendments to the Fair Labor Standards Act which particularly affected tire dealers may have been published or may have first been circulated?

And I recognize you couldn't remember as to a particular day or month, but about when, if you can recollect.

"A. Well, let's see. I believe it was around 1958. Whether that was the year it appeared in the Federal Register or not I can't say, but it was approximately that time.

"Q. At the time of the appearance of these regulations pertaining particularly to the tire dealers, do you remember what activity your association engaged in, in respect to those regulations?

"A. May I ask, do you mean previous to the issuance of the regulations?

"Q. Previous to, if you recollect, sir, or at the time 496 of, or in consequence of.

"A. As I remember it, it was a conference in the office of Mr. Goldberg, at which time—

Mr. Ray: You had better specify which Goldberg. We have two Goldbergs over there now. One we call Senator Goldberg and the other is Secretary.

The Witness: This is Joseph Goldberg, I believe. At which time a rough outline of a proposal was made which would give some interpretation of certain types of sales, principally the commercial type of sales within the industry.

We found this preliminary proposal so much to our disliking that there were several conferences held on this matter from time to time. We objected strenuously to the matter of price and quantity being determining factors in the issuance of a regulation in the tire industry, for reasons that were explored in great detail at that time.

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This matter was discussed, and there were quite a number of people from time to time that participated in these conferences. As I remember it, a second proposal was drawn and while this was an improvement, we still protested vehemently on the grounds that we felt that the quotation of the law, and this is stated in our 497 various documents, 'as recognized in the industry,' was thoroughly and clearly understood by tire dealers over the country, and that to our way of thinking should solve the problem or the thing that was to be accomplished by the Department of Labor.

As I remember it, we were told at the time that it was felt that something more specific had to be spelled out and so, as I remember it again, at a later conference, a proposal was submitted to us which we carried back and studied with staff people, our attorneys and some selected tire dealers, and we recommended, as I remember it, a few changes in it.

We again restated our position on this matter of industry interpretations but it was quite clear at the time, and I don't think this is in the least disputable, that there was going to be some sort of regulatory measure. And inasmuch as we had no choices really as to what we felt should be done with the thing, because we were endeavoring to cooperate with the Department of Labor and do everything we could to be of assistance, we made such recommendations in keeping with the proposal that they had made, as we felt might be helpful, and as I recall it, they accepted every one of these proposals that we made, and it was on that basis that the order came out.

498 We were notified by telephone, I believe, that it was in its final form and that it would be published in the Federal Register at a later date. It didn't appear quite as soon as we thought, but later it did appear, and



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we gave it attendant publicity in our publication and did everything we could to bring the thing to the attention of the tire dealer.

"Q. Now then, sir, you have indicated that you conferred prior to the publication of these regulations on one or more occasions with a Mr. Goldberg, and for the record, is that the same gentleman Mr. Goldberg seated at this table while this deposition is being taken?

"A. That's the Mr. Goldberg.

"Q. Now then, sir, in your opinion did the regulations pertaining particularly to tire dealers reflect the industry's recognition or definitions of terms as they did appear, and as those regulations did appear in final form?

"A. Would you restate that question?

"Q. Yes. I am asking whether or not the regulations under the Fair Labor Standards Act, as amended in 1949, in the form those regulations finally appeared, I am asking whether or not those regulations reflect the  
499 industry's recognition and the same definition of terms as are used in the industry?

"A. No, this is not as recognized in the industry. This was a compromise which was explained to us was a matter of interpretation which was to be required, but I don't believe we ever changed our position from the very beginning that the phrase, "as recognized in industry," which we have used many, many times, is clear and definable and without problem.

"Q. In line with that last comment that the position is unchanged, I hand you that which appears to be a typical accounting sheet for summarizing sales or other income, and I will ask you first, sir, if you can tell me what it is and when it is used, and what purpose it is used for.

"A. Yes. Well, this is a financial statement of a tire dealer member of this Association. This is for the year



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1953. The name has been deleted and it is identified only as a Middle West Tire Dealer from a medium-sized community.

We used several of these this year in a series of meetings which numbered approximately fifteen or sixteen across the country to try to help tire dealers in the 500 operation of their business. This was obviously in the year 1954 because these were current at the time. This is a thing which we have done before.

"Q. Am I correct in thinking when you say you have used that at several meetings that that which you hold is a photostatic copy of an exhibit or of a chart that is part of a program presented for meetings at your dealers?

"A. This was mimeographed and distributed to the tire dealers that attended the meeting, this and other exhibits so they might take them home. We thought these were worthy of study. We give them copies of financial statements to take back to their own community to study and compare with their own statements and this is one of these.

"Q. Would you have that marked Exhibit F to your deposition, please?

"A. Yes, sir.

(Whereupon, photostat was marked Defendant's Exhibit F, for identification.)

(Defendant's Exhibit F, for identification, was thereupon exhibited to counsel.)

By Mr. Mitchell:

"Q. Now, sir, would you state, with regard to Exhibit F, whether or not sales are classified in any way 501 on that exhibit, and if so, what the classification is?

"A. On this particular exhibit we have new passenger tires differentiated from new truck tires and again differentiated from used tires. This firm also sells

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mechanical goods, miscellaneous merchandise, and has services such as wheel balancing and alignment and has a service and paint department.

In addition to that, they have done what we call a further breakdown within a department and have broken their new passenger tires and new truck tire sales down between retail and wholesale.

"Q. And as you construe that exhibit, does that breakdown of new passenger tires and new truck tires between retail and wholesale sales reflect the definition that you stated a while ago in your testimony, namely, that sales for resale are wholesale, that all other sales are retail?

"A. I have every reason to believe that I could clearly identify any ticket or invoice of this company as defined in this operating statement.

"Q. And would you state whether or not, although that appears to be taken from some companies accounting statement for the year 1953; my question is whether or not that reflects the current interpretation of your  
502 Association with regard to the classification just discussed.

"A. I would be reluctant to answer that in its full text inasmuch as we now have a problem of a completely new and different interpretation with the Department of Labor as to the difference between the retail and wholesale sale, and just what tire dealers are doing to further extend their bookkeeping and accounting procedures to reflect this, I can't say.

I could say that as far as the tire dealers are concerned, if we were to have a meeting tomorrow of tire dealers and were to talk about retail sales as against the wholesale sales, we would not have the problem of definition between the two areas.

"Q. And Exhibit F reflects this common recognized definition you just referred to?

"A. To the best of my knowledge, it does.

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"Q. Now then, sir, after the regulations in final form under the Fair Labor Standards Act, as amended in 1949 were issued, and by regulations I mean those pertaining particularly to tire dealers, what was the reaction of the members of your Association to such regulations and what interest or what economic problem did they have with respect to compliance with same?

"A. Well, unfortunately I fear that the reaction  
503 was practically nothing.

"Q. Can you explain why there was little or no reaction at the time of the appearance of these regulations?

"A. I should qualify that statement by saying I have no knowledge of what correspondence the Department of Labor may have had to their publishing of these proposed regulations in the Federal Register. They may have received correspondence of which I am not familiar. But to my knowledge, there was little or no reaction.

The problem rests with the fact that as we tried to explain these new regulations at meetings, the best we can hope to do is to reach some fifteen communities in the United States with a limited amount of time to explain this along with some of the other problems which would be timely at the moment, and that you're probably only reaching one-third of your membership, and unfortunately there are some outside who were not members of our Association.

So that this doesn't give you a very wide exposure. There is also a tendency at these meetings to get your larger tire dealers, and many of them are in metropolitan areas where they have organized labor, and as a result, they have problems of record-keeping and payment of wages which they have already dealt with on a different  
504 basis, but which solves maybe more than one problem, but it does leave a large group of people in some substantial areas who did not get the benefit

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of this thinking, and who probably aren't as devout about reading their mail and the correspondence and the printed matter that comes to them as they should be.

Then there is, of course, the smaller tire dealer who can't travel to an area two or three hundred miles away to attend such a meeting, and he is generally so busy he reads nothing that is sent to him. So your problem is one of exposure in a matter of this kind.

"Q. Well, with regard to the larger tire dealers who can and do take advantage of the meetings your Association holds, you have indicated that perhaps there was submerging of the problem under these regulations in a union contract or labor bargaining agreement.

Would you explain please, sir, how that would operate, that is, how this submerging would take effect?

"A. Well, if a man is a larger tire dealer and in a community that he might find himself with organized labor, then the chances are that his wages for the most part would comply in every sense with the requirements of the Fair Labor Standards Act, and in order to do the record-keeping, which is required in a union contract, he would also be able to comply with the record-keeping requirement of the Fair Labor Standards Act, and so that whatever small difference might be left over with such an arrangement, he would find the easiest course of action would be to put his whole organization under such an arrangement and handle it on that basis.

"Q. What about the labor cost of tire dealers in the larger metropolitan areas, and particularly I guess the Northeast and perhaps the West Coast?

From your knowledge of this industry in the last three or four years, has the labor market, that is, the price for labor, equalled or exceeded the minimums under the Fair Labor Standards Act?

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“A. For sometime now areas like Philadelphia, Chicago, Seattle, San Francisco, we are paying anywhere from \$1.75 to \$2.35 an hour.

“Q. And in specific answer to my question, to your knowledge is that in excess of the minimum set by the Fair Labor Standards Act?

“A. Yes.

506 “Q. Now then, sir, I would like for purposes of delineating the specific recommendations that were made down through the years, and according to the exhibits already offered, to point out some particular things in those exhibits and ask whether or not they reflect at present the interpretations and definitions recognized by your Association and in the particular industry.

First, sir, I direct your attention to Page 5 of Exhibit A, which is your letter dated February 21, 1950, and I will ask you to find on that page the statement with reference to the market price of truck tires which are sold in volume, the reference being:

“Since the sales are direct from the tire dealer to the ultimate consumer, the sales have always been considered as ‘retail’ in the industry and would appear to be truly of that nature.”

And again, on the same page of the same exhibit, the phrase:

“As previously stated, such sales are, and are considered in the industry to be, retail sales—but Interpretative Bulletin No. 6 evidently treated such sales as ‘wholesale’.”

507 Do you find those statements at that place in that exhibit?

“A. Well, first I would like to qualify one thing, that my reply would in no way want to compromise the position of this Association which recognized the authority of

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the Federal Government, and we are trying as best we can to re-educate our people to the requirements of the law.

However, I can say that as it is spelled out in this exhibit, that if we were to have a forum or a discussion similar to the one, for example, that we are going to have next week with some thirty tire dealers from various parts of the United States at which time we are going to discuss this matter of identification of accounts, this would be the nomenclature that we would use for purposes of our discussion because they would be the ones which would be most easily recognized and which would leave us on a common ground of understanding.

"Q. Right. Thank you, sir. Now then, with regard to that which has been made Exhibit C to your deposition, and specifically your answer to question number 2, which is a part of Exhibit B, the question being in part: 508 'How does the Association distinguish between sales of parts that are recognized as retail and those that are not so recognized in the industry?'

And your answer to that question number 2 being: 'We classify a retail sale as one made to the consumer. If a tire is purchased for resale it is counted as whole-sale.'

And again I ask you, is that a current interpretation or definition as recognized in your Association and in the particular industry?

"A. In our publishing of articles and correspondence we would use this terminology and this we believe would be clearly understood by the tire dealer.

"Q. For further reference and cross-referencing, we will mark the parts of these things in brackets that are quoted for the record.

Now, then, sir, also in the answers by you to questions by the Wage and Hour Administrator, made Exhibit C to

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your deposition, on the second page of such answers the statement is:

509 'As stated previously, all of these sales to commercial users, including sales to large fleet users and national accounts, are considered by the Association and the tire industry as a whole as retail sales, for the very practical reason that they are sales to the ultimate consumer.'

And I will ask you again if that continues to be the interpretation and use of such terms and classification of such sales by your Association and the particular industry, today.

'A. This is terminology which is commonly accepted within the industry today.

'Q. Just above that, in the same exhibit, is the phrase:

'As I pointed out in my letter of February 21, 1950, however, in this industry sales cannot be classified as other than retail on the basis of the size of the discounts, because the discount structure is extremely complex and encompasses a myriad of variations. Practically all sales to consumers, even those of one or two tires to an individual user, are made at some kind of a discount.'

510 And I ask you if that is still the attitude and interpretation of this Association and the particular industry, and if the facts stated therein are to the best of your knowledge—whether or not they obtain today.

'A. This is very definitely true even today.

To give you an illustration which may help serve the point, certain trucking accounts have set up dummy companies to receive tires in order to siphon off the maximum of the discounts which are normally allowed for a wholesale delivery of tires, so that they not only get the string of discounts which are given to a trucking account, but get the additional discount of the wholesale sale.

And in our own way of thinking this would be identified



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then because he does have, even though it can be quickly seen through, this would be a resale account even though we would surmise that the great bulk of this company's purchases would go to one user.

"Q. Now then, sir, turning to your Exhibit D, which is the memorandum of what is recognized as retail sales in the tire industry, dated July 30, 1954, the lead statement of that memorandum is:

511 'The purpose of this memorandum is to demonstrate that throughout the history of the tire industry sales to commercial accounts have been recognized in the industry as retail sales.'

And again, with the qualification you very understandably suggested with regard to the obligation of your dealers to comply with the law as enunciated by the Wage and Hour Administrator, apart from that aspect, does this statement still present the views of your Association and the particular industry?

"A. That is true.

"Q. On Page 4 of that same July 30, 1954, memorandum made Exhibit D to your deposition this statement appears:

'We believe that this is the best possible proof that the industry has consistently recognized retail sales as including all sales for use and not for resale. Sales to commercial accounts of course come within this definition.'

And with that same qualification about compliance with the Wage and Hour Administrator's regulations, this continues to be the fact in the industry?

512 "A. This continues to be the fact.

"Q. And finally, at the conclusion of that July 30, 1954 memorandum, this statement appears:

'We submit that all of this evidence taken together makes it clear beyond doubt that sales to commercial users are "recognized as retail sales or services in the particular industry," and should be accepted by the Administrator as conclusive.'



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Without reference to what should be accepted by the Administrator, is it still a fact that compilation of the same evidence of the conditions as they pertain today would demonstrate the same recognition of retail sales and services in the tire industry?

"A. Very definitely.

"Q. Now then, Mr. Marsh, you have given us already an insight into the pricing practices in the tire industry, and I believe you may have had some reference to them in some of the information that was marked already from your exhibits, but I would like to direct your attention to a general statement on Page 4 of your Exhibit A, which is your letter of February 21, 1950, to the 513 Administrator, Wage and Hour Division, and I will mark that which is entitled '(2) Price Differentials,' and which continues over actually to the conclusion of the memorandum.

I will ask you to look at that and see if that statement of pricing practices, as they obtained in 1950, would continue to be an apt and accurate general statement of pricing practices among tire dealers today?

"A. I would say that the entire text of page 4 of this exhibit, starting with No. 2, Price Differentials, clear to the end of the page is true.

There has been, within the past thirty or forty-five days a move within the industry to shorten up these discounts and make truck tire pricing more realistic. However, this does not mean that the prolonged discount schedule, which is set forth in these two paragraphs, does not still remain. It does.

Recent market quotations in major cities show truck tires being sold at 9-10's. This off of list. This is 10, 10, 10, and so on, nine times. Now the only way you can tell a dealer in this deal is because he gets another discount for delivering them. So again the status of the

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wholesale account against the retail or user account  
514 is the differentiations still maintained, but the discounts from list is certainly no gage of the classification of the buyer.

“Q. That was going to be my next question. In the soft market, which you have just remarked about in the tire business in the recent past, even though the number of discounts is extended has there been any pattern evolved that would be different than that stated in your Exhibit A?

“A. I would like to make one point, it isn't ‘market’, it's ‘markets’, plural, it's more than one.

“Q. All right, sir.

“A. This is a prevalent situation in the industry that is creating real chaos but no change of the discount schedule basically has been made. In other words, it becomes a series of ten percent discounts. They are trying to make them less numbers of tens, and they have done this by shortening the list price from so-called list down to so-called key dealer, but this accomplishes little in the overall problem area.

I do want to repeat again though that where these sales are delivered by dealers that there is a further discount provided for the dealer for his handling as a wholesale account.

515 “Q. Now then, sir, the aspect of vulcanizing or recapping or retreading comes into some of the documents which have been marked as exhibits in your testimony, and I refer you to Pages 1 through 3 of your Exhibit A, specifically the part headed: ‘(1) Vulcanizing and Recapping Services by Tire Merchants’, and I will ask you if that is still an apt and accurate general statement, and if you would just review it to your satisfaction in order to answer my question.

“A. The material set forth in paragraph 1 of the letter

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of February 21, 1950 is still true today, and the three classifications set forth in the first full paragraph of Page 3 are still applicable.

“Q. Now then, sir, I direct your attention particularly to a statement on what has been made Exhibit C to your deposition, and it consists of answers to questions addressed to you by the Department of Labor. Specifically, Question 13, I believe, and that question reads:

“Is the vulcanizing, retreading, or recapping by tire dealers of tires owned by fleet operators, trucking firms, bus and taxi companies, or by other commercial, 516 industrial, governmental or institutional customers considered a whole or a retail transaction?”

And your answer to that Question 13, which appears on Page 4 of the answers made Exhibit C to your deposition is:

‘This type of business is considered as retail business in the industry.’

My question is whether or not that statement is still factual and whether that recognition in the industry obtains today.

“A. That is true. And in all the cases with which I am familiar there is a different discount schedule for a commercial sale as against a wholesale sale.

“Q. Now then, sir, further on the subject of recapped tires, and going back to Exhibits B and C, the question raised by the Department of Labor as the 15th question on Exhibit B is:

‘Is the sale by tire dealers of tires which they have vulcanized, retreaded, or recapped ever considered a retail transaction? Are establishments operated by such dealers recognized as retail establishments in the industry?’

517 And your answer, being answer No. 15 on Exhibit C:

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'Sales by tire dealers of tires vulcanized, retreaded, or recapped by them and resold at retail have always been considered retail transactions, and establishments operated by such dealers have been historically recognized in the industry as retail establishments. In such a case the dealer customarily takes the used tire as a trade-in on a new tire, repairs it, and then resells it at retail. Since the acquisition of the tire is a part of a retail transaction and the sale is also at retail, it would seem clear that the entire transaction should be considered one at the retail level.'

My question with respect to that which I have just read from your exhibits is: Does that continue to be a factual statement and does that continue to be the interpretation of such sales transactions by your Association, and in the particular industry?

"A. This is certainly still true today just as it was then. In my opinion it is still considered a retail transaction.

518 "Q. Earlier in your testimony you referred to the fact that sometime ago, you believed as you personally recollect, fairly soon after this exchange of correspondence and furnishing of information to the Department of Labor in early 1951, there was a change or modification of rulings and practices which the Department had prior to that time followed to reflect your Association's and the industry's views with respect to the recapping and retreading of tires.

Am I correct in thinking that the change was to an attitude reflecting what was in the correspondence we just read?

"A. Yes. We were completely satisfied with the outcome.

"Q. Now then, sir, I hand you a copy of publication entitled Interpretative Bulletin, Title 29, Part 779 of the

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Code of Federal Regulations, which parenthetically shows on its cover page that it is the text of the Code up to and including January 1, 1960, and any Federal Register amendments issued thereafter, up to and including July 31, 1960. Also on its cover it reflects that it is a publication of the United States Department of Labor, and specifically of Mr. Clarence T. Lundquist, Administrator, whose office appears here as Washington, D. C.

And I turn to pages 33 and 34 of that pamphlet 519 or publication, and I can advise parenthetically that this is the form in which this Interpretative Bulletin existed at the time of the investigation of the defendant in the case in which your deposition is being taken.

I will ask you, sir, to review the several parts of this interpretative Bulletin on Page 33 and possibly 34 entitled in part Application of the 13 (a) (2) and 13 (2) (4) Exemptions to the Automotive Tire Trade, and I direct your attention to the several numbered and lettered paragraphs following that title.

My question with regard to same will be whether or not they do or do not conform and comport to the recognition in the tire industry as you know it, and to the use and definition of terms in accordance with the use and definition of the same terms in the tire industry, and first as to Paragraph (b) that has to do with the general application of the exemption under Section 13 (a) (2), and then Paragraph No. 1 underneath that concerning sales for resale.

Is that or not in conformity with the recognition in the particular industry?

“A. (reading) ‘Sales for resale: For example, sales of tires, tubes, accessories or services to garages, 520 service stations, repair shops, tire dealers and automobile dealers, to be sold or to be used in reconditioning vehicles for sale are sales for resale.’

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This we still consider to be true.

“Q. Now, then, Paragraph (2) under (b) has to do with sales made pursuant to a formal invitation to bid, and it goes on to illustrate what manner and type of sales pursuant to invitations to bid take place, and I wonder whether or not that type of sale is recognized as a retail sale or as a sale for resale in the tire industry.

“A. Frankly, this is a matter in which we have little interest. The independent tire dealer is denied, in most cases, is denied the opportunity to compete for this type of business, so the small amount that is involved here is a matter of little consequence whether you classify it as retail or wholesale.

“Q. All right, sir.

“A. We would assume since here theoretically it goes to the user it would be considered a retail sale, but this is a matter which is generally handled by the tire manufacturer on a direct basis.

521 “Q. Now then, No. (3) refers to sales to national accounts as known in the trade, and it goes on to describe what it means by national accounts.

Now in connection with this, I want you to accept the description of the so-called national account which appears in this Paragraph (3) and state whether or not in the industry such sales are considered to be at retail or are not considered to be at retail.

“A. Well, the language of part (3) is quite familiar to me because if I remember correctly we were helpful in this area. We consider this very definitely to be a retail sale. The only difference between this and any other type of sale to a large user is the manner in which the billing procedure is handled. Instead of being billed by the local dealer, this is billed by the factory or home office on a centralized basis.

The delivery of tires is made on as little as one or two

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tires, and they could be passenger tires, they don't necessarily have to be truck tires. So this is a matter of billing procedure and not a matter of classification of account, and as far as we are concerned, this would go in our books, in our accounting breakdown, as a retail sale.

522 "Q. Now, then, turning to No. (4) in this set of regulations which concerns sales to fleet accounts at wholesale prices, and the same paragraph (4) contains an explanation of what the words fleet account means as here used, and the sense and context of paragraph (4) is that that is to be treated as a wholesale sale or at least as a sale that is not retail.

My question is whether or not the treatment of such sales to fleet accounts is interpreted and regularly practiced in the tire industry as a retail sale.

"A. We consider sales to a user, and this we have stated over and over again, as a retail sale. The number of vehicles that the man has is no particular criteria of his classification of account. In many cases the number of vehicles that the man has is information which is denied to the tire dealer; at least he has no accurate way of determining this. This is a classification of account which has no historic relationship to the industry and the classification or establishment of an account.

"Q. Now that same paragraph (4) goes on to delineate a distinction based on the pattern of prices, and refers to the wholesale price of such tires will be taken to be  
523 the price typically charged in the area on sales of passenger car tires for resale.

My first question is: Is there a relationship, as you know the pricing practices of the industry, between whatever the price may be on the resale of passenger car tires and wholesale prices for tires, tubes and accessories, or any other factor of the pricing practice?



*Testimony of Winston W. Marsh*

"A. As we stated at that time, and I certainly could restate again, I believe this identification of price is unrealistic and unworkable. For example, I am not familiar with the most recent changes because these have not been fully published, we know that they are coming. But to go back to some thirty or forty-five days, one manufacturer has six classifications of buying prices for passenger tires alone.

This is determined regardless of whether the man is a service station, a car agency, a garage or other smaller tire dealer; it is determined by their estimate of his volume. This is not even followed realistically, so to have an audit made of anyone's book and say this is the wholesale price of a tire it would have to be further identified by his saying this is the wholesale price  
524 of what tire sold to whom.

One cannot draw a parallel and say that this is a wholesale price that is charged to service stations. Service stations might buy at any one of the six prices and still be considered a wholesale account. The tire business is one which historically has been one of bargaining and you bargain for the best position and the best recovery that you can, and the situation in the tire industry instead of improving since 1958 has deteriorated and the problems in pricing today are even more grave than they ever have been before.

We have a whole new type of super-operator coming into the distribution pattern of tires which even further complicated this situation so that there is nothing on which we can factually, and I will the phrase, hang our hat on, in the identification of an account, except those things which we know, that this is a man who intends to resell the tire or this is the man that intends to use the tire.

"Q. Moving on to paragraph (5) of the same regulation



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on Page 33 which has to do with sales of tire rental service on a mileage basis, known in the trade as mileage contracts, and some other material on that subject;  
525 first I want to know, is there a position on the part of your Association or its members with regard to this practice if in fact it exists?

“A. Well, the tire rental business is increasing. We believe that anyone who rents tires intends to use tires. They obviously are not going to rent tires for wholesale purposes. They are renting tires because they will be put in service whether it be on a bus, a truck, taxicabs or even pleasure cars today.

This thing has changed. This is a part of the market in which we do not share to a great extent. But as far as a clear-cut marked definition as to who uses rental tires, it is a consumer or user, not a wholesale account.

“Q. No. (6), sales of servicing and repair work performed under a fleet maintenance arrangement on tires for trucks and other automotive vehicles whereby the establishment undertakes to maintain the tires or tubes for a fleet account at a price below the prevailing retail price.

Now I understand from your previous elaboration upon the complexities and variation of prices and practices in the tire industry what your argument might be with regard to prevailing retail price. But would you state whether or not this sale of repair work performed  
526 under fleet maintenance arrangement would, according to your Association, and in the particular industry, be construed as a retail sale or not?

“A. I think the Industrial Classification Manual clearly identified retreading and those things pertinent to it as a service, and a service in this area, and this is not a large part of the average tire dealers' business. To some dealers this is very important, but the service—and the

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retreading of tires is a service, and such would be considered a retail transaction.

One could hardly wholesale service or labor, and the price at which new tires might be delivered in conjunction to this has no relationship to the facts.

“Q. Now to turn over to Page 34 of this same set of regulations, and as the final paragraph of this particular part of the regulations, namely, paragraph (e), the statement appears:

‘An establishment engaged in retreading or recapping of tires is recognized as a retail establishment in the industry if it does not derive from the sale of tires retreaded and recapped for sale more than 50 percent of the annual dollar volume of its sales resulting  
527 from its retreading and recapping operations.’

Now I want to know if there is, to your knowledge, a recognition in the particular industry or by your Association of this 50 percent break-off point with regard to dollar volume of sales in the determination of whether or not a tire retreader is a retail establishment.

“A. This particular paragraph is confusing to us because earlier in the same regulations it refers to 85 percent in the category breakdown. I know of no industry definition of 50 percent, and the only way I know of that this may have been arrived at, I just learned in the past six months that the Bureau of the Census in judging whether a man is principally tires or principally hardware or principally retreader is determined by whether better than 50 percent of his business is done in one category or not.

This is the only part of the industry that makes reference to 50 percent. We didn't even learn this until we had some conferences with the Census Bureau people within the last six months.

“Q. But you would not agree then with the statement as it appears in this regulation?

*Testimony of Winston W. Marsh*

“A. There is no clear-cut definition of this in the industry.

528 “Q. Now then, sir, you have indicated the date 1958, and I would like for purposes of the record to determine whether or not, according to your present recollection, it was during 1958 that you engaged in these conferences with personnel at the Wage and Hour Division, among them Mr. Goldberg who has joined us this morning, apropos the publishing of regulations in the original form from which I have just made reference and extracted in my last few questions.

“A. Yes, we had a series of conferences on this.

“Q. Now during the last little while in your testimony you have stated certain of the handicaps or hardships, disadvantages to the classifications as expressed in those regulations.

Can you recall, sir, whether or not the same type disadvantages and type of hardships were expressed to appropriate officers at the Wage and Hour division during your conferences in 1958?

“A. I have every reason to believe that basically the same arguments, the same illustrations that I have used this morning in relationship to this problem were true then and presented then. We had strong reservations at that time about this, as I pointed out earlier. There were  
529 some compromises made in some of them, particularly the number of vehicles, and so on, but even with that we pointed out that we felt this was very unrealistic, very hard to determine.

At that time it was pointed out to us that our only alternative might be to select someone on whom we could make a test case out of. Well, this is a very reluctant position for a Trade Association to place itself in, to select one of its membership for a matter of this kind. That is one of the things we feel it is appropriate for a

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Trade Association to avoid, to keep itself clear of legal involvements, because we are not in a position of giving legal advice in that sort of thing.

Our job is to help our members and not to deal with their law problems. So we backed away from this particular choice and did the best we could with the proposal that was made and said that we would do everything we possibly could to assist its facilitation, which we have done, I might add.

. . . . .

531

**Cross-Examination,**

By Mr. Ray:

“Q. Mr. Marsh, among your many duties and responsibilities as Executive Secretary and Manager of the Association you occasionally, I believe, testify before Congressional committees?

“A. That’s right.

“Q. Particularly in reference to items concerning the membership of your Association?

“A. That is true.

“Q. In connection with that you testified in the hearings in June, 1959, before the Sub-Committee of the Select

Committee on Small Business of the United States

532 Senate of which Senator Morse was Chairman. Do you recall that testimony?

“A. Correctly stated, sir, it was a Sub-Committee of the Select Committee of which Senator Humphrey was the Chairman of the Sub-Committee and which he chairmanned on several occasions, and on which, as I recall, Senator Morse was Chairman or moderator for the day.

“Q. Apparently from the record he was the Chairman of the particular date on which you testified, which was June 17, 1959.

“A. I think that is right.

*Testimony of Winston W. Marsh*

“Q. One of the items about which you were testifying there, or perhaps the principal item, was as a result of the unfair competition in your opinion which independent tire dealers were facing from the practice of the large tire companies to make direct sales sometimes even to customers who bought as many as two to four tires; is that right?

“A. That’s true.

“Q. In connection with that testimony you described to the Committee how you and your Association had worked with various Governmental agencies in connection with the regulatory laws which might be applicable  
533 both to tire dealers and business generally as far as anti-trust or competition is concerned.

And you indicated to the Committee that you had, in connection with working with the Department of Labor and an explanation of the Wage-Hour law as it applies to tire dealers, that you had published a manual on this subject for your industry. Do you recall that testimony?

“A. On the Wage-Hour laws?

“Q. Yes.

“A. Yes.

“Q. Now I hand you here a pamphlet or document which you have made available to us and ask you if this is the document you were referring to in your testimony, and if that was issued by your Association to your membership; and if so, whether as far as you know, it went to the thirty-some-odd-hundred members of your Association.

“A. Yes, this book without the insertion, which is a publication of the past six months. This book itself, without that insertion, was the matter to which I referred.

“Q. Does that particular manual still have validity as far as your Association is concerned in the sense that it has not been in any way revoked or otherwise amended by your Association?

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534 "A. With the exception of the amendments to the Fair Labor Standards Act, which were recently invoked by Congress, which have been added as an amendment to the thing, and we still circularize this to any member who requests it, and we sent it to new members.

"Q. Would you file that document as Exhibit 1 to your cross-examination in this deposition?

"A. The insert to which I referred we will have stapled to the inside cover so it can be made a part of the permanent book record.

(Whereupon, booklet was marked Government Exhibit No. 1, for identification.)

By Mr. Ray:

"Q. Further, in connection with your testimony before the Senate Sub-Committee, you included a chart which reflected the various percentages of establishments that did various gross amounts of annual sales. That particular chart I show you on Page 22 of the official record of the hearings and ask you if that particular chart is still valid, generally speaking.

535 "A. This was predicated on the 1954 U. S. Census of Business. There are some changes in category here which are probably the result of changes in the marketing pattern of tires. To what extent this would change the percentages or the number of establishments is very difficult for us to determine inasmuch as we don't have access to all of the industry figures. As far as the number of establishments are concerned, this is still a pretty valid figure.

"Q. This particular chart would reflect that establishments that did \$30,000 to \$49,000 in total sales comprise 16.2 percent, and I am reading now the larger ones, I am leaving the smaller ones out.

\$30,000 to \$49,000, 16.2 percent;

\$50,000 to \$99,000, 22.4 percent;

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\$100,000 to \$299,000, 23.8 percent;  
\$300,000 to \$499,000, 4.3 percent;  
\$500,000 to \$999,000, 1.7 percent;  
\$1 million to \$1,999,000, .2 percent;  
\$2 million to \$4,999,000, .03 percent.

Now, with particular reference to the last three items in that chart, could you state whether or not in your best judgment those figures would roughly hold their validity today, give or take a fraction of a percentage point, so as to make it easier for you to answer?

536 "A. This is the group from \$500,000 a year up, that is, \$500,000 to \$999,000; \$1 million to \$1,999,000; and \$2 million to \$4,999,000; those three groups?

"Q. Yes.

"A. I would say as a guesstimate this is probably reasonably accurate yet today.

"Q. Now, with respect to the retreading of tires as performed in certain tire dealer establishments, let me ask you if it is or is not a customary practice for the tire dealer to sell retreaded tires and take in trade for recapping and sale to other customers the tires of their customers as trade-ins?

"A. This would be a very hard thing to determine and it would vary a great deal by establishments, but from traveling a great deal over the country and visiting a great number of tire dealerships, I would be more inclined to feel that the common practices are to retread the customer's own tire and return it to him.

Many places feature one-day service and will take the tires, make an appointment, take the tires in the morning and have them retreaded and back on the car in the afternoon. It is true that there are cases, in the case  
537 again of passenger tires, that the tire is taken off and they find out of four, one of them would be no



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good so that they might have a matched up set they won't sell him a tire out of stock.

There are some places, on the other hand, that would prefer the practice of exchanging casings, but whether this is a large number or not I have no way of knowing. I would not think it would be.

Now the truck tire field is completely different. The truck tire field is principally and almost wholly the re-treading of a customer's own tires and returning them to him.

"Q. In connection with your correspondence and conferences with the officials in the Wage and Hour and Public Contracts Divisions of the United States Department of Labor about which you were examined earlier in your direct examination, have you had other correspondence which has been called to your attention, and if so, what did that further correspondence consist of and what was the date of it?

"A. I have here a letter dated July 3, 1958, addressed to the Honorable Clarence T. Lundquist, a letter over my signature, covering what seems to be two particular  
538 points in the proposed regulations or interpretations for the tire industry, adding some views which we hoped would be helpful.

Then we have a letter over the signature of the Administrator. Unfortunately, this is a carbon copy, unsigned, and I am provoked with the fact that we cannot find the original, which is an acknowledgement by the Administrator, addressed to me, a probable date of which is November 4, 1958, which acknowledges receipt of this correspondence dealing with national account sales on the one hand, and the customer's fleet size on the other.

"Q. Will you identify those documents, the letter from you to the Administrator of July 3, 1958, as Exhibit No. 2 to your cross-examination?



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“A. Yes.

“Q. And the reply, of the approximate date of sometime in November of 1958 as Exhibit No. 3 to your cross-examination?

“A. Very well.

(Whereupon, copy of witnesses letter of July 3, 1958 to Administrator was marked Government Exhibit No. 2, for identification.

Copy from Administrator to witness was marked  
539 Government Exhibit No. 3, for identification.)

By Mr. Ray:

“Q. Mr. Marsh, as the record already indicates, there were extensive conferences and communications between you and the Labor Department subsequent to the 1949 amendments on up until this 1958 date concerning the interpretation the Labor Department would issue concerning those sales which were regarded as retail in the industry?

“A. That and the matter of the retreading being classified as a service. We had a great number of conferences on both matters.

“Q. And you furnished extensive information to the Labor Department officials on this point and supplied them with all the information that you could think of, I would assume, or at least I should ask you if you did, so that they would fully have the views of your Association concerning what would be the proper construction of these questions as they affect independent tire dealers, did you not?

“A. This is true, and in July of 1954, for example, we did a rather comprehensive survey of our members on these various points to develop some information  
540 which would help to determine these problems which were being propounded.

“Q. Then to your knowledge the Labor Department

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officials at least gave time consuming and lengthy consideration to the problem?

"A. I have every reason to believe that they did. At least they were given the opportunity to give it every consideration.

"Q. And they, in working with you as a representative of the Association, strove to arrive at some common ground as to what interpretation would be both practical and at the same time be either the construction of the law, at least which the Labor Department considered to be the interpretation of the law which would cause the least displacement in the industry and at the same time give due regard to the law, did they not or did you both not?

"A. If counsel will permit, I would like to make this observation: We were quite content with the phrase, 'as recognized in industry', and we were content to leave the law at that point. The Labor Department was not. Inasmuch as they were not content to leave it on that point, then we tried to contribute as much as we could to make

such assistance available as would have an interpretation which would be the least problematical.

In other words, what I am trying to say here, at this point here I think any unanimity of thought in this area had gone. It was a matter of compromise more than anything else.

"Q. Mr. Marsh, if I may I would like to read to you and ask you to state whether it accurately represents a picture, and I will show it to you so you can read the whole thing, and counsel if you wish, a statement in an inter-office memorandum to the Administrator, from Mr. Kantor who was concerned with this problem which referred to conferences that you had with the officials of the Labor Department, and I am now reading from this memorandum.

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Mr. Mitchell: Pardon me. I don't think the record reflects—you used the term inter-office memorandum, would you state with whom Kantor was associated or by whom he was employed so he will know?

By Mr. Ray:

“Q. Mr. Kantor was one of the officials in the Wage and Hour and Public Contracts Division of the Department of Labor, and Mr. Brown, to whom this memorandum was addressed which appears to have been 542 received, which appears to have been prepared on March 22, 1958, and which reads in part as follows, the pertinent part:

‘Sales to “national accounts” were conceded to be non-retail by the representatives of the National Tire Dealers and Recappers Association in our conferences with them. However, Mr. Marsh, the Executive Secretary of that group, urged incorporation of a definition of such accounts as “customers operating in more than three states who have centralized billing”. The difficulties this would provoke were pointed out and he did not pursue the matter further.’

I will show you that memorandum and ask you if that is correct summary of the conferences you had on that particular subject with the officials of the Labor Department?

“A. The problem set forth in this memorandum which is dated December 21 that sales to national accounts were conceded to be non-retail is an extremely controversial point which could take up the next two hours of deliberation if we followed it because this became a very tender point, that if a sale is not retail and it is not wholesale, what is it. And what a category of non-retail 543 involves, to this day I do not know. But this was nomenclature which said this was neither one nor is it the other, so for the purposes of interpretation it becomes non-retail.

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This is the same category in which most truck tires fell because the description of the word non-retail was that delivery of tires 50 at a time, 20 at a time, was hardly considered a retail sale. So therefore, being not a retail sale or if we cannot accept it as a retail sale, it became non-retail even though it wasn't wholesale.

As a matter of fact, in these very deliberations it was pointed out that the delivery—a new car changeover of a brand new automobile of five tires was one more than a customer would normally buy since he has only four wheels on the ground. Therefore, changeover from black to white sidewalls on a brand new 1960 or 1961 automobile, whatever the case would be, is a non-retail sale because it is in quantities more than those normally used by a motorist.

This I do not understand. I did not understand it then; I don't understand it now. And it would be erroneous to say that I accepted it. I merely gave way because I could see no point in arguing something that is a completely foreign term of which I am not in the least bit familiar.

544 The same evidence is pointed out here in the fact if we are to have an interpretation of national accounts, which I pointed out in earlier testimony is not a matter of grave concern to us, then we have terminology for national accounts in this industry. There is a law case on record which spells out and identifies national accounts.

“Q. Is that the Federal Trade Commission case?

“A. No, sir. This is a court where we sought damages, and it is spelled out in this law. It has also been spelled out in testimony before the Federal Trade Commission. There is a clearly identifiable definition of national accounts.

It definitely constitutes deliveries in more than one state. It definitely constitutes centralized billing, and all

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other opinions notwithstanding, this is still what we know in the industry. So to be arbitrary and say this is not workable, this cannot be, as it was accepted as stated in this (indicating), is, as far as the tire industry is concerned, unrealistic.

If we have to live with it we will try to find some way to live with it. This was our position at the time; I guess it's our position now. As far as this being any matter of acceptance on our part, I protested vigorously at the time, and I protest vigorously now, because  
545 this is not realistic.

“Q. You were not persuaded then, as I understand it, by the arguments advanced at your conferences that the national accounts, as they are described in the—ultimately described in the interpretation which was formulated on the basis in part of some of the language suggested by you, that they are non-retail or should be regarded as non-retail sales; am I correct on that?

“A. Let me first state that I think that the definition which finally came out and which is set forth in our little brochure, booklet, is a reasonably accurate definition of a national account.

But I frankly still do not know what a non-retail account is, if it isn't wholesale.

“Q. While we are on that subject let me ask you whether or not, according to accounting practice in the tire industry, there is in fact not three recognized categories of sales without regard to whether they are retail or non-retail and wholesale and so on, and that is, retail, wholesale, and commercial?

“A. Basically this is true.

“Q. There is, in fact, a third category of sales which are recognized under accounting principles?

546 “A. With very good reason there is a third category.

“Q. Would you mind giving us the benefit of your

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views as to what the reasoning is behind having the third category of commercial accounts?

“A. Generally the establishment that will break this into three categories is a larger establishment with salesmen, with outside salesmen. A retail salesman, as such, does not sell truck tires. A truck tire salesman might sell passenger tires but does not solicit passenger tire sales.

A truck tire salesman in a commercial department, per se, works on a narrower margin of commision and very often the deal made to a salesman working for a retail establishment selling commercially will have a different deal or percentage paid on gross profit to the commercial salesman than they will to the retail salesman.

As a matter of fact, the retail salesman is even broken down into times to the budget for the retail or passenger tire salesman. The series of discounts on commercial tires and truck tires is different from the deals made on new passenger tires.

A wholesale account, to separate it out, is done for the simple reason that we often find it one part of our business activity that becomes unprofitable. So it is not  
547 unlikely that a large tire establishment would have a tire division selling at retail, a tire division selling commercially, and a tire division selling at wholesale, so they could operate all three.

Good accounting procedure dictates if you like to know what each department is doing and how it is working its way out, that you are wise to separate it this way. The unfortunate part about our industry, which has no bearing on this case, is that more people don't do it.

“Q. Now let us come back to the issuance of the regulation and its publication in the Federal Register as a preliminary determination upon which the comments of industry are solicited.

Do you recall your suggestion to the Wage and Hour

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officials that the time had now come that they might as well proceed with that aspect of the rule-making to see what comments would be received after they had conferred with you concerning the language that should be included; do you recall your suggestion to those officials that apparently we, by that I mean you and the officials had come to the point where now was the time to put that out as a preliminary determination for comments; do you recall that?

“A. We certainly arrived at a point where further discussions were going to contribute nothing. We had  
548 exhausted the whole thing and if we were to have some sort of interpretative rule, this was as close as we would get to it that would be completely satisfactory, although we preferred no rule, we apparently were going to get a rule whether we wanted it or not, so at that point there was nothing left to do but to see what would happen. So we were told that unless there was a strong objection that this would be published in the Federal Register, which it subsequently was.

“Q. And then thereafter, after the period for comments had expired, if your recollection permits you to say so, the so-called final regulation was published as such in the Federal Register, a copy of which I now hand you. I don't intend to put this in since it was published.

I don't recall the date, but it was scheduled to be published, according to this, in the Federal Register on February 25, 1959.

“A. And it became effective March 28, 1959. Without reading every word, this appears to be the document as I know it.

“Q. And that having become the official interpretation of the Labor Department you then circularized your members as to what that official interpretation was  
549 as is shown by the manual here which is Exhibit No. 1 to your cross-examination?



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“A. This is true.

“Q. It does not appear to me what the original publication to this was, but according to your recollection in your testimony it was issued after the effective date of the official interpretation as published in the Federal Register?

“A. I think it would be fairly safe to say that this would be true.

“Q. Mr. Marsh, in your testimony you referred on occasion to the setting up of a dummy corporation so corporations can get the maximum discount, I think those are your words, and referred to wholesale delivery of tires.

Could you elaborate on that and clarify that a little for us as to what you were referring to?

“A. With discounts such as 7-10's, 8-10's, 9-10's, there obviously isn't or should not be very much left with which to pay for the cost of the merchandise. However, where dealers have made deliveries of this kind they have oftentimes, in most cases, been guaranteed a commission as we have pointed out in the direct selling hearings, to which you referred earlier.

550 So some larger truckers, in order to get the full deal, have bought a small service station or taken it over or put in a store front operation, called it a tire store, and became their own best customer, and this way they got not only the long discount deal given to the truckers, but their wholesale allowance as well. So they get all the privileges of a wholesaler, and all the privileges of a commercial or consuming account, and enjoy both.

“Q. Well, there is recognition or at least it is not foreign to the tire industry that quantity purchases of tires by a customer as well as quantity purchases of tires by a dealer carry a lower price than purchases in smaller quantities is that not correct?

“A. This is true. On one hand clear down to the point of buying two passenger tires for your own personal



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automobile will get you a better price than one tire, and if you buy in sets it will get you a better price than if you buy two.

The only problem with the tire industry is that you are not sure that when you buy a set you are going to get as low a price as the man who bought two. If this were to fall into some sort of a measurable pattern this would be one thing, but there is no apparent pattern in the tire business.

551 I have seen tire prices change in one day like the ticker-tape on Wall Street. It is unbelievable, some of the things that have gone on when we have price wars in an area, their prices change momentarily. And in this case quantities are forgotten.

So there is recognition given for quantity clear down to the purchase of two passenger tires.

“Q. Is there anything basically different in a tire war as you seem to have described here and a gasoline war?

“A. Well, frankly I cannot answer that question. I get so deeply involved with the problems of the tire business I seldom have time to look at other industries. I assume they have problems too. But one thing I do know: Time after time and time again the tire industry has gotten some pretty bad publicity for some of the pricing practices, and the files of the Justice Department and the Federal Trade Commission are pretty tangible evidence of this.

“Q. But you are not testifying, are you, that quantity purchases either by the dealer or by the dealer's customer would not ordinarily call for a lower price than the purchase of four of the ordinary two to four times?

552 “A. Basically this is true. As a matter of fact, even their wholesale pricing program has certain considerations for volume purchases whether they are in one delivery at one time in one place or whether

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they are extended purchases over a quarter or over a twelve-month period of time.

There are considerations given to volume in the whole industry program. I should not be so sweeping in that remark because I believe there are some smaller tire manufacturers that make an exception to that, but basically this is true.

“Q. Is it or is it not customary for the dealer on sales made pursuant to national accounts to install the tires and otherwise perform services for which he receives a commission of some amount which varies anywhere from five percent perhaps to ten percent, or somewhere in that neighborhood?

“A. This is true. Seven-and-a-half percent is about the accepted thing. Some companies go ten. I think there are some deals that are handled on five. And in return for this, why the dealer mounts the tires.

“Q. He has to stock them too?

“A. He has to stock them, put them on the car, and then fill out a form and send it in and sometime in the future, why he gets a credit back for what he put on plus the handling charge.

553 “Q. On the sales to Government, State, local municipalities, sales of that type, is the procedure similar to that followed on national accounts, or, if not, what differentiation would you make between sales of that type and national accounts?

“A. Well, if there is anything I have learned in the past couple of years, the question you have just asked eliminates me as any sort of authority, because I found so many procedures in this thing I am just not sure how to describe it.

As I understand it, and I will have to repeat, as I understand it, there are a number of states which require local dealer participation on state sale, so that a company

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can get the bid but the dealer in that area must be able to participate in the business and they can select whatever dealer they want.

The Federal Government sales are made direct to the Federal Government by the manufacturer, and I know of no dealer who participates in this unless it might be on some sale to a GSA account or possibly to some small station that might have some funds made available to them that they can purchase locally, and this generally is predicated on a GSA contract with that company.

554 Municipality business is sometimes taken by an arrangement similar to national account with billing and credit-back, but again your pricing procedures here are just as bewildering in this field as they are in the entire tire industry as evidenced by one of the dockets now before the Federal Trade Commission which finds the states are buying tires cheaper than the United States Government, which is a very bewildering thing to the United States Government.

“Q. What differentiation, Mr. Marsh, do you make between fleet sales as they are described in the interpretation, which also is formulated on the basis of suggestions made by you, and the national account sales, as to the participation by the dealer in the ordinary case or by the dealer as distinguished from his non-participation and the direct sale by the manufacturer?

“A. Now as I understand it, in answering this question I am confined to my remarks about the fleet sales being limited to the interpretation as it is here, and not to fleet sales in the category as we understand fleets. You are talking about, in the strict sense of the regulation, the number of vehicles?

“Q. It would be preferable if you could deal with it generally and then draw it down to the definition.

555 “A. All right. I can dismiss that part easier.

*Testimony of Winston W. Marsh*

It is very difficult for the tire dealer to ascertain how many vehicles are owned by any fleet account. For all I know the head of the business might have his wife's automobile listed as part of the fleet. It is true, as I have pointed out in correspondence and with conferences with the Department of Labor that we do break down—the manufacturers I should say—break down ten or more trucks, it matters not how many vehicles, ten or more trucks, as a source of solicitation and try to encourage the dealers to call on these people. Some do it with five; others don't. Then there are some, the larger accounts list twenty-five and more.

On a national account sale the dealer can solicit the business but he knows that he can only get an order if he is on the approved list and if he happens to sell a brand of tires which is not on their approved list, visitation will get him nowhere because he is disallowed, he just isn't in the business. He can't get this.

But if his company is on the approved list he can go in and say Do you need some tires, and they say, Yes, we'll buy six next month, or whatever the case may be.  
556 They generally order in that fashion, and he can go ahead and make sure he has the stock and make delivery at the proper time for which, as we pointed out, he gets a specified commission.

Now right next door may be an account that buys more or less as the case may be, which would be a fleet account. He could have five trucks and buy \$15,000 worth of tires a year and the fellow on the other side of him may have fifty trucks and buy no more. It would depend on whether one runs trucks on a coffee route or whether it has over-the-road trucks.

If he makes a sale to this fleet account, in the broad sense of the word, no matter how many vehicles are involved, he determines the prices he will sell it at, and

*Testimony of Winston W. Marsh*

he determines whether there is sufficient profit for him to render the service, make the delivery, carry the credit, and do the other things he must do.

Now as we showed again on our testimony on direct selling before the Senate Small Business Committee, we have a third variation of this now where the manufacturer comes in and even the smallest dealer buying \$25,000 worth of tires a year can take an order for  
557 25,000 truck tires and make the delivery because his manufacturer will assist him in making the delivery and give him some sort of a token payment for it.

As a matter of fact, the manufacturer in some cases, in very many cases, will even send the truck in and have service people mount the tires for the fellow. Of course, his commission becomes lesser as he gets to these things.

In either case there are tires sold to a user or consumer. They are a fleet sale or commercial sale, whatever nomenclature you wish to give them, and they all add up to the same thing. The difference is the way you arrive at this particular conclusion or sale.

“Q. Now one, I think, final question. You have broadly characterized all sales made to a consumer or user as a retail sale irrespective of the quantity of tires involved in the transaction or the price charged for the tires in that particular transaction, including all the various discounts, and so on.

In other words, is this a fair statement: That if I purchased a thousand tires for my equipment from one of your members at a price which was thirty percent or more  
558 and bought four tires from that dealer on that same day, that both those transactions, his purchase and mine, would under your view as expressed in your testimony here, be regarded as retail sales?

“A. Let me see if I have the question correct. You

*Testimony of Winston W. Marsh*

are talking about making a sizeable purchase for a thousand units, thousand tires, to fit your equipment?

“Q. Right.

“A. Mr. Mitchell is a what, a dealer?

“Q. Mr. Mitchell is another customer who goes to the same dealer on the same day and buys four tires for his car and he has to pay at least thirty percent more for those tires than I have to pay for mine.

“A. Then they are both retail sales.

“Q. Your view would class both transactions as retail?

“A. And if they were in the State of Ohio we would have to pay sales tax on both sales.

“Q. Would it make any difference if both Mr. Mitchell and I were buying specialized tires like snow tires, which we intended to store and put on when it became winter time?

In other words, does it make any difference in your evaluation of the thing as to whether they are going to be used right away or maybe they are going to be  
559 held and used later? I believe you said in your testimony that the intended use was the criteria.

“A. If it is your intention to use these tires and you are the consumer, therefore, this is a retail sale. And the fact that you might, for example, start buying up let's say earth moving tires for big equipment on a big contracting job which you are going to store and stock and transport, and it will be six or eight months before you get all set up on the job to operate, this is still a retail sale.

And I made mention a while ago of an account buying \$25,000 worth of tires who gets a sale for 25,000 tires. This doubles his business. But the 25,000 he buys to resell in his place and the \$25,000 in one order that he delivered, or four lots, I don't care how he delivered them, is a retail transaction.

*Testimony of Winston W. Marsh*

Mr. Ray: You may have the witness if you wish to re-examine.

**Redirect Examination,**

By Mr. Mitchell:

“Q. Just a few questions, I believe, Mr. Marsh, with respect to some of the items or exhibits introduced in your cross-examination.

First, I believe during the break just prior to  
560 your cross-examination you located a blue printed sheet entitled Basic Wage-Hour Law, and organized generally in three columns.

I will ask you if you would sir, to please describe what this is and state whether or not it came out prior to the 1949 amendments to the Fair Labor Standards Act, and what use was made of it.

“A. No, this blue form here is the second of two almost similar forms. We brought this out to help our dealers to understand the law and to properly classify their employees and to understand some of the things about the law which would be a problem to them, particularly a matter of record keeping. Then when there was some changes made, particularly those dealing with re-treading, then we brought this second form out and this was given very wide distribution. It was given out at a number of our meetings and we did everything we could to help familiarize our people with the requirements of the Fair Labor Standards Act.

“Q. Could you tell me approximately what the dates of those two publications were as issued by your Trade Association, and I don't need anything more specific than before or after 1949, which from your testimony this morning would be during the time you have been  
561 the Executive Director.

“A. This has been since 1949.



*Testimony of Winston W. Marsh*

“Q. Then I am correct in thinking that that presents your Association’s interpretation and analysis of the Wage-Hour law as it existed after the 1949 amendments?

“A. Even more correctly than that, that form as was the booklet which was introduced as evidence, were both read, and while I understand technically the Department of Labor cannot give approval of documents of that kind, I think I can safely state that they found no exception to the things that were stated there.

“Q. I would like for you to mark those exhibits, please, sir, to your deposition. And since this is redirect, let’s return to the lettering system. If you would mark the first of the two in the order in which they appear.

“A. These are both the same. I don’t have the old white form.

“Q. Then would you mark this Exhibit G to your examination?

“A. Yes, sir.

(Whereupon, paper entitled Basic Wage-Hour Law was marked Defendant’s Exhibit G, for identification.)

562 By Mr. Mitchell:

“Q. Now then, Mr. Marsh, if we cannot determine specifically the year in which this blue form now made Exhibit G was circulated by your Association to its members, do you recollect that this blue form was published and circulated by your Association before the proposed regulations by the Wage and Hour Division came out we think in 1958 or 1959?

“A. Oh, yes, it was very definitely before that. As a matter of fact, the amount of wages shown on here, the minimum, shows it was previous to the inauguration to the one-dollar an hour minimum wage.

“Q. In respect to the brochure or pamphlet that has been made Exhibit 1 to your cross-examination, Mr. Marsh, you are, I am sure, familiar with the substance of it?



*Testimony of Winston W. Marsh*

“A. Yes.

“Q. And I want to ask you whether or not from your knowledge and recollection it states anywhere in the pamphlet itself that the pamphlet presents the recommendation or the approval or the accommodation of your Association to the regulations that are discussed in it.

“A. As far as I know there is no reference made to that. It was never intended to do that. It is not supposed to be a propaganda piece. It is a documentary bit of assistance to dealers to help them to understand the law and that is why the illustrations and so on are put in there.

“Q. Do you recollect whether or not a letter or correspondence of any sort went out with it to your members expressing your Association's satisfaction with the regulations as they had finally appeared, or dissatisfaction with such regulations?

“A. I am reasonably positive that there was nothing put in writing for the simple reason that we worked on the premise the least said the better.

“Q. Now then, on your cross-examination, sir, you were asked about a table that categorizes tire dealers apparently by sales volume and which is referred to in the questions on cross-examination as appearing on Page 22 of the official report of the Committee in June of 1959, before which you testified.

I would like to show you the table to which reference was made in such questions and ask you if you can tell by it or your knowledge of it or the footnote that appears beneath it, whether or not this analysis of dealers by income reflects all tire dealers or reflects only your Association members or just what does it encompass?

564 “A. In the first place, the connotation of the word ‘dealers’ in the sense of independent tire dealers is incorrect. Sales volume of TBA dealers refers to the

*Testimony of Winston W. Marsh*

outlets and it also includes the company-owned stores of the major rubber companies.

The analysis made by the 1954 Census of Business as I understand it, and as it has been described to me by the Census of Business, means in these cases there are approximately 18,000 people, fifty-one percent of whose sales are in tires, tubes, retreading and related lines in the rubber field. It is fifty-one percent or more.

They also show quite a number, some 2,000 retread shops who sell new tires, but fifty-one percent of their sales are in retreading.

It could very well be as I pointed out earlier, a man could have a tremendous appliance business doing half a million dollars, or be a big oil jobber, and not be included in this listing.

“Q. And to further elaborate the figures and the gross volume and the percentage of retailers or outlets doing such volume as reflected by this chart, will you state, sir, whether or not that would or would not be consistent with the same figures as applied to your Association’s 565 membership, if you know? That is, if such figures have been compiled.

“A. I have never even considered it in that light. I couldn’t answer that intelligently. If I were going to hazard any kind of a guess, ours would be well towards the middle.

I can tell you the size of the membership of our Association and what our dealers sell, but this I don’t know would be of any assistance.

“Q. I believe you stated on cross-examination that this chart in any event would include company-owned stores or controlled outlets as well as the so-called independent retailer who would be a member of the Association?

“A. It could also include automotive chains.

“Q. Yes.

*Testimony of Winston W. Marsh*

I believe you brought some more information down pursuant to request by Plaintiff's attorney that you accumulate what you could from the files during this period, 1954 and up into 1958.

Would you state, sir, what this is, that is a typewritten memorandum apparently dated July 20, 1954, addressed to the members of the Executive Committee, to which are attached several folded accounting column 565a sheets? I would like that identified and described please, sir.

"A. I don't know what provoked this, but apparently it emanated from some conference held with the Department of Labor officials, but it seems to be an answer to some sort of request for further information about how sales are ticketed or how they are broken down.

This has been a long and controversial subject, as has already been indicated today, and I am sure that there must be more of this than that. But one of the people, and this is from Demers Brothers, Inc., 333 Pleasant Street, Worcester, Massachusetts, and he gives us a copy of his tire department sales and types this statement in:

'For the past twenty years we have separated our tire sales into wholesale and retail sales. We have always classified our sales to commercial accounts as retail sales.'

Down below he writes an addenda to this, dated July 23, 1954:

'I have just checked the local Goodyear store and found that they are also treating their sales to commercial accounts as retail sales.'

Here is another one. This one is from Bill Deane, which is a tire company in Roswell, New Mexico. This is 566 a notarized statement and says:

'This is a copy of the daily sales journal and form used and has been used in the past six years in the operation of the Bill Deane Company.'

*Testimony of Winston W. Marsh*

And it shows tires, retail, wholesale, batteries, stock, and so forth, accessories, retail, wholesale, and recaps, retail, wholesale. They also sell sporting goods, retail, wholesale; major appliances, retail, merchandise, appliances, retail, television, retail.

As I recall it there were other answers to the same thing. I don't have those in the file. These are the only ones I could find. There was apparently a problem of time because the memorandum is dated July 20, 1954, and I said I had to have an answer by July 27, so this must have been one of those matters of hurry up.

"Q. Mr. Marsh, I will ask you to refer to Part III of your Exhibit D earlier identified in your testimony, starting on Page 4 of that exhibit, the date of which exhibit is July 30, 1954, and I wonder if perhaps by reference to that part of Exhibit D your memory may be refreshed somewhat in that sort of an analysis was being made, and among what part of your membership.

567 "A. This exhibit shows:

'In obtaining information on this score,' the accounting procedure, 'it has of course been necessary to use a sampling procedure. The Association could not seek information from each of its approximately 2500 members. Nor could it use its Board of Directors for this purpose, since it has 56 members. Hence we decided to use the Executive Committee, which has 12 members located throughout the United States as follows: Montgomery, Alabama; Phoenix, Arizona; Oakland, California; Atlanta, Georgia; Chicago, Illinois; Worcester, Massachusetts; Henderson, North Carolina; Tulsa, Oklahoma; Portland, Oregon; Ardmore, Pennsylvania; Dallas, Texas; Aberdeen, Washington.

'At a meeting of this Committee held July 19-20, we asked each member to state his accounting practices with regard to classification of sales. Eleven of the members

*Testimony of Winston W. Marsh*

of the Committee reported that their accounting records classify all sales to consumers, whether they be commercial users or individual users. In the wholesale  
568 category, they include all sales for resale. These

11 members also stated that this practice has been uniformly followed by them for many years past.

'The twelfth member stated that his accounting records broke sales down into three categories—retail, commercial, and wholesale. He added, however, that this were merely a matter of convenience to him, and that he had always considered sales to commercial accounts as retail sales, since they are sales to consumers.'

"Q. Now then, sir, having read and refreshed your memory from Exhibit D, could you determine whether or not this July 20, 1954 statement addressed to the members of the Executive Committee, and the attached accounting data were sought and obtained pursuant to or in connection with the survey discussed in Exhibit B?

"A. My recollection is that the form from Demers Brothers is in answer to it and that the form supplied by Bill Deane from Roswell, New Mexico, is in addition to this.

"Q. Well, would you then mark the memorandum  
569 and the one of those that you think is a part of it—

"A. This is the man from Worcester, Massachusetts. I think it so states.

"Q. All right. Would you make that then Exhibit D-1 and Exhibit D-2 respectively, to your deposition?

"A. Yes.

(Whereupon, copy of memorandum of July 20, 1954 and attached journal were marked Defendant's Exhibits D-1 and D-2, respectively, for identification.)

By Mr. Mitchell:

"Q. Mr. Marsh, on your cross-examination you were

*Testimony of Winston W. Marsh*

offered and read certain excerpts from this memorandum by a Mr. Kantor to Mr. Brown, the explanation having been given that both of those gentlemen were officials of the Wage and Hour Division of the Department of Labor during the time this memorandum was exchanged as an inter-office memo. And you were asked if it correctly reflected the sense of agreement or disagreement at the conferences between yourself and others on behalf of the industry, and presumably Mr. Kantor and others on behalf of the Department of Labor.

I would like to ask you with reference to the same  
570 memorandum by Mr. Kantor whether or not the statement made here, and I quote:

‘ . . . the traditional patterns of distribution are not followed in the tire trade.’

Is that, in your opinion, an accurate statement? You can probably read it easier than you can listen to it.

“A. (reading) ‘As in the case of the automotive trade . . .’

Frankly, I am not sure what is meant here by the words automotive trade. Whether this means automotive parts, whether it means new automobile distribution, or whether it means allied lines like oil and petroleum.

“Q. Was this something that was discussed or agreed upon or decided in any way during the conferences between yourself and Mr. Kantor, and presumably others?

“A. Well, I don’t recall this having been discussed, and I certainly could not qualify as any sort of an expert to render an opinion on the automotive trade. But from what little I know of the automotive parts trade, and what I have seen in the oil trade, there is not a great deal of difference than the tire business.

“Q. Further in same paragraph in Mr. Kantor’s  
571 memorandum, the statement appears:

‘The question of retail recognition in this industry

*Testimony of Winston W. Marsh*

is further complicated by the fact that a tire sale is rarely made at list price.'

Was this matter discussed and is that an accurate presentation of the facts?

"A. Yes, this matter was discussed, and I was inclined to agree with Mr. Kantor that it was very rare for a tire to be sold at list price. I must rather ruefully admit to making this statement in public. I had dealers write to me and say they did make sales at the list price, which surprised me.

"Q. The next sentence in the Kantor memorandum is: 'The extent of the discounts granted . . .' either 'by' or 'to'—it must be 'to a customer, ordinarily depends on a combination of the number of tires he buys and the competitive situation.'

Let me repeat that for the record: Because there is a preposition out of order. The phrase reads:

'The extent of the discounts granted to a customer ordinarily depends on a combination or the number  
572 of tires he buys and the competitive situation.'

Is that first a matter that was discussed at the conferences with Mr. Kantor?

"A. Yes, we have talked about this. Of course, the sentence makes it implicit that this is a 50-50 combination, 50 percent one way and 50 percent the other. I don't think this necessarily follows.

I would say that the competitive situation is the governing factor basically on what price tires are sold at. The number of tires may have some influence on it, and probably do, but in some circumstances this would weigh to a very small degree.

"Q. Then already discussed with you on cross-examination is one of the phrases hereafter in the memorandum to the effect:

'Sales to "national accounts" were conceded to be non-



*Testimony of Winston W. Marsh*

retail by the representatives of the National Tire Dealers and Recappers Association in our conferences with them. However, Mr. Marsh, the Executive Secretary of that group, urged incorporation of a definition of such accounts as "customers operating in more than three states  
573 who have centralized billing." The difficulties this would provoke were pointed out and he did not pursue the matter further.'

The memorandum by Kantor continues:

'The evidence indicates that national account sales are not ordinarily made on a dealer's own account, but in behalf of the manufacturer. Also, these transactions are such a matter of common knowledge that the qualification "as known in the trade" now in the proposal needs no elaboration or clarification.'

I believe in response to a question on cross-examination you have already developed your disagreement with Mr. Kantor's observation that you on behalf of your Trade Association concede this business of national accounts being properly classified as non-retail sales.

I wonder, sir, if you would tell us just how it was that you offered the definition or sought to have a definition of national sales, national accounts, incorporated, and what the background of that offering by you was.

"A. Well, it certainly would seem that in the matter of national accounts that we had some historical background for the definition of national accounts, and that this  
574 should not be too hard to clarify. The paragraph however, is a contradiction within itself inasmuch as it points out that I said 'customers operating in more than three states who have centralized billing,' end of my statement. It goes on, 'The difficulties this would provoke were pointed out and he did not pursue the matter further.'

Then down below it says, 'Also these transactions are



*Testimony of Winston W. Marsh*

such a matter of common knowledge that the qualification "as known in the trade" now in the proposal needs no elaboration or clarification.'

Well, these two don't necessarily hang together, because they do operate in more than one state. They do have centralized billing. This does make it a national account.

As I pointed out earlier, by virtue of a law suit within this industry and some restrictions on the growth of national account sales and the fact that we are limited to doing anything about it, by consent decree, the whole problem of national accounts is not a matter that deserves a great deal of debate and argument as far as we are concerned, so if conceding is just simply withdrawing from the matter, letting it go, I suppose that is what we did.

575 "Q. You were asked, I think on cross-examination on at least one occasion, perhaps more, about the regulations which were formulated on the basis of suggestions made by you, at least in part, prior to the issuance of those regulations by the Labor Department.

Would you tell us, sir, what had transpired, what the nature of the discussions and conferences were up to the time when you did submit some recommendations or did agree to go over whatever regulations the Labor Department already had in the works?

I am asking whether or not this represented a change of attitude on your part about the regulations or I think you indicated in your testimony that it was simply the acceptance of the inevitable. I believe I am paraphrasing you correctly.

"A. I wouldn't want these to be called suggestions because they were far from that. They were more realistically corrections or amendments to a proposal. As I pointed out earlier, we felt that the phrase, 'as recognized in industry,' covered the subject, was well understood and would be understood by tire dealers everywhere.

*Testimony of Winston W. Marsh*

576 In all of the time that elapsed since the discussions first started and the day that the final interpretation was brought out, there was nothing that we found in the field, not even so much as one thing in my memory, that would have changed my mind in this regard, but as I pointed out earlier, the Labor Department said that this must have further clarification and that would therefore have to have some interpretative rule of the tire industry as they have had in other industries, therefore, we would have an interpretative bulletin about the tire business.

At this point you are faced with several choices. One, to—as I pointed out, select some likely tire dealer and go to court about it. This is certainly not a choice for a Trade Association to make.

Secondly, we could just go back here and wash our hands of it and forget it. However, to do that would mean that we could get something that would just be really very bad for us, so at that point we did what we thought was the wisest course of action and something that has marked our relationship to the Labor Department, and I hope other Government agencies as well, in that we tried to sit down and come up with the best sort of a program we could under the circumstances.

577 “Q. I believe, Mr. Marsh, you were also asked on cross-examination whether or not in your opinion the officials at the Labor Department, specifically the Wage and Hour Division, gave due consideration to the recommendations that you made and the writings that you submitted, some at least of which—perhaps all of which—are made exhibits to your testimony, and I am not sure I caught your answer.

What in your opinion was the nature of the acceptance or consideration given the suggestions you made in writing and otherwise by or on behalf of your Trade Association?

*Testimony of Winston W. Marsh*

“A. Well, I would have to answer that in parts. One, in the matter of retreading, they were very solicitous and very interested, and as nearly as I can remember almost in its entirety they accepted the recommendations that we had made on the retreading industry, and this matter was resolved without any problem whatsoever.

On the matter of classification of sales and its relationship, whether it is a retail or wholesale sale, this was a matter of disagreement from, I think the record states 1950 on, and while our relationships with the Department were most pleasant, and while our conferences were well attended and all the evidence that we could  
578 possibly supply was submitted, the fact still remains we got an interpretive bulletin and didn't get what we wanted.

“Q. Were other sources than your own writings and recommendations and development of facts brought out during the conferences as you recall it that were in conflict with your own suggestions and recommendations?

“A. Not that I know of. I have reason to believe from what I was told by the Department of Labor that they had also solicited the views of several or many or all of the tire manufacturers. How many, I do not know. We pursued our own course in this as we have in all other matters independent of their activities.

I had one or two telephone conversations with interested people at the manufacturer level and I had reason to believe from what I was told that they shared our view. However, I have no proof of that.

“Q. Well, let's assume that the manufacturer's representatives did share your views as to definitions and classifications and sales in the tire industry.

Were any opposing or contending views to those expressed by you on behalf of your Association brought out or discussed at the conferences with Mr. Kantor and others?

*Testimony of Winston W. Marsh*

579 "A. Mr. Mitchell, there were none brought out and none discussed. Whether there were any opposing views, I do not know.

"Q. Then the chronology and history that is represented by your testimony and borne out by your exhibits reflect a rejection of the views in the industry as expressed through you on behalf of your Association and its dealers without, to your knowledge, any contrary expression from the industry having been heard by the Labor Department?

"A. Quite truthfully, Mr. Mitchell, I would be reluctant to answer that if the full text of the question was asked. I am not sure I am qualified to answer that.

Mr. Ray: I think it might be pointed out, as shown in the publication in the Federal Register at least, opportunity was given to any interested parties to make comments.

Mr. Mitchell: Yes.

By Mr. Mitchell:

580 "Q. My question I believe, in context, and certainly in intent, was meant to be confined to the conferences you had prior to the publication of the regulations with Mr. Kantor and others at the Labor Department, and I was asking as to what you did know of contrary or contending views opposite your own and to those of your Association, based entirely, of course, on what was developed for you at such conferences.

"A. I know of no one, at least from the industry, that opposed this point of view. They were certainly none of our rank and file of membership who opposed this view. We explored the thing, and as it shows, there was plenty of time here to explore it to the fullest. We felt that what we had recommended represented pretty much the unanimity of thought of our tire dealers. That is about as far as I could go as far as an expression is concerned.

. . . . .

*Testimony of Mrs. Virginia Lauderdale*

585           **MRS. VIRGINIA LAUDERDALE,**  
having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Mitchell:

Q. Mrs. Lauderdale, would you state what your position is with defendant, Steepleton General Tire Company?

A. I am Office Manager, in addition to Secretary and Treasurer of the corporation.

Q. For how long have you held the position of Secretary and Treasurer of the company and also been employed as the Office Manager?

A. Since May of '45.

Q. As part of the proof in this case, the gross receipts of sales and services for the corporation has come in, the figure of \$903,520.00, I think it is—yes, \$903,520.00.

Do you agree that that is gross receipts from sales and services by Steepleton General Tire Company during the calendar year 1960?

A. Yes, sir.

Q. Considerable discussion has been devoted to the national account transactions in tire dealing.

Are you familiar with same by reason of your employment at Steepleton General Tire Company?

A. Yes, sir.

Q. Are national account transactions reported by Steepleton General Tire Company as a part of the regular sales and as a part of the regular receivables of that company?

A. No, sir.

Q. Would you explain how a national account transaction is handled for bookkeeping or record purposes, and if you know, how is it handled as a matter of sales and merchandise by Steepleton General Tire Company?

*Testimony of Mrs. Virginia Lauderdale*

A. National accounts, as far as we are concerned—our national accounts deliveries are not sales. We make the delivery for General Tire and Rubber Company, in which we have a national account delivery receipt which is filled out and sent to the company, and they in turn issue us credit for this merchandise.

As far as our records are concerned, it is entered on a daily summary of sales, and an amount of cost of the tire is credited against the purchases, and the delivery commissions—the commissions earned.

Q. Is some kind of thing taken so you can check back against the purchase orders to know actually the details—  
to ascertain the cost of the particular tire delivered  
587 by Steepleton to the General Tire customers, cost  
of that very same tire so entered on that memorandum which you described.

A. Yes, sir. That is the reason we put it on our invoice. Those invoices we refer to as sold to General Tire and Rubber Company are only a matter of record as far as we are concerned.

Naturally, we couldn't keep up with the tire unless some record is made of it, so it is put on our invoice for a record purpose only.

Q. And do you also have a record as to the particular customer of General Tire & Rubber Company to whom the delivery is made on a ledger account as General Tire & Rubber Company, made Plaintiff's Exhibit 9 in this case?

A. Yes, sir.

Q. And the handwritten part in next to the far right column indicates the one to whom delivery is made?

A. That is the name of the customer to whom General will bill the merchandise. And that is put on so that we can check those as credit issued from General, and indicating who from, or whose name credited to.

Q. Then, there is a figure on the national account deliv-

*Testimony of Mrs. Virginia Lauderdale*

ery transactions by Steepleton General Tire Company in 1960 in this record, was not quite approximately one 588 hundred fifteen thousand dollars.

Did that come from those white ledger cards, to your knowledge.

A. Yes.

Q. As a matter of fact, are two or three, perhaps several entries on those thirteen ledger cards I believe made composite Exhibit 9 which are not in fact national account transactions?

A. Yes, sir, occasionally we returned a tire to General for some reason, or maybe they borrowed one, or one that we did not particularly need and credit was extended on the same. And it is put in there again as a matter of record. That is a record account and not an accounts receivable.

Q. So, if the total of these transactions or these ledger entries and what-not which are made by Mr. Micklish should turn out to be the one hundred fifteen thousand that is already in the record for national account deliveries by Steepleton, that is the maximum and in fact would be some amount slightly less than that?

A. That is correct.

Q. And in this one hundred fifteen thousand dollar figure, is there supposed to be an amount against 589 that of your purchases adjustment, the inventory adjustment, which is the recovery of cost by Steepleton General Tire Company—is that included in the one hundred fifteen thousand?

A. You mean the commission we get?

Q. No, not the commission. The recovery of inventory cost.

A. Yes.

Q. Is that included in the one hundred fifteen?

A. Yes, that is right.

*Testimony of Mrs. Virginia Lauderdale*

Q. Is any income there received, anything other than purchase adjustment cost of Steepleton General Tire Company?

A. Never at any time, only purchase on the general account. We receive no money, anything, from General; get a credit there to us for the amount of the tire credited it back.

Q. A credit to purchases, which you testified is an adjustment of cost of goods sold has nothing to do with income?

A. No.

Q. The only part that is income is the part of the commission or payment of some sort made for delivery and rendering the service.

A. That is right.

Q. That will be very small, frequently five or seven percent, perhaps, of the one hundred fifteen thousand dollar figure?

596 A. That is right.

Q. I think you already indicated, and in fact, that Steepleton does not consider that in any wise sale, services—or one of your services?

A. It is not a sale. It is a delivery record only.

Q. Was this same explanation you just testified given Mr. Micklish on more than one occasion when an audit was being made of Steepleton Tire Company's records in this case?

A. Yes, that is right.

Mr. Mitchell: I believe that is all.

I beg your pardon, just a minute.

Q. Was this Tennessee sales tax at the rate of three percent figure collected at all on national account transactions by Steepleton Tire?

A. No, sir.

Q. Or was it during 1960?



*Testimony of Mrs. Virginia Lauderdale*

A. No.

Q. As a matter of fact, does Steepleton General Tire Company or anybody connected with it have any knowledge of the value at which the customer of General Tire & Rubber Company buys the product?

A. No, sir.

591 Q. Since sales tax has to be computed on the basis of the sales price, you could not even fix or impose or compute the sales tax?

A. Correct.

Q. Are transactions known as national account taken into account or excluded from the total when any volume bonus is computed for the amount of goods purchased or handled by Steepleton General Tire Company as a credit against General Tire & Rubber Company, the Akron Company?

A. That is right.

Q. And if you follow me and not get confused, my question was this. The point is that national account transactions are excluded from the computation of volume bonus arrangement by the Steepleton Company?

A. They are deducted before we qualify for it.

Mr. Mitchell: Thank you.

**Cross-Examination,**

By Mr. Tineher:

Q. Mrs. Lauderdale, in regard to the deliveries made by your company to General Tire & Rubber Company national account customers, is the commission for  
592 such deliveries the same, regardless of how long you may have had the tire in stock that is delivered to the customer?

A. Yes, sir, the commission is set by General Tire & Rubber Company, and it may vary from time to time over the period of a year. But at that particular time, it was whatever it was.

*Testimony of Mrs. Virginia Lauderdale*

Q. Well, some of the tires which you deliver are tires which have already been paid for by Steepleton Tire Company, paid to General Tire & Rubber Company, is that right?

A. It could be.

Q. And on those tires, of course the Steepleton General Tire Company has had its money tied up in inventory stock for a period of time, hasn't it?

A. If I follow your question, you mean that that is a tire that we had already purchased and paid for?

Mr. Tincher: Yes.

A. (Continuing) Of course, I would have no way of knowing which tire we are going to deliver, whether it is one we had paid for or whether one we had not paid for at the time.

Q. But, in any event, when delivery is made, the serial number off the tire is noted on the invoice, and then you relate that number back to your purchase order in order to determine and to advise General Tire & Rubber  
593 Company which merchandise you delivered?

A. No, sir, no tire is delivered from General by serial number.

Q. I believe you just explained in answer to Mr. Mitchell's question that you do relate the transaction back to your inventory, your stock number.

A. That is the stock number, not the serial number.

Q. Perhaps I misunderstood you. How else would you identify the particular merchandise that you had delivered by a stock movement number if the serial number was not indicated?

A. Stock movement number is on the invoice, the date on which that particular tire might have been purchased, but it does not mean that the serial number would appear on General's invoice. It would be impossible for them to bill us by serial numbers.

*Testimony of Mrs. Virginia Lauderdale*

Q. But would it not be necessary for the Steepleton Tire Company to identify, either by a serial number or some other number, so that you would be able to check from your stock movement records the particular merchandise that had been delivered to one of the national account customers?

A. They ask for a stock movement number, on which we have to verify prices. That is, if there has been a price change since the purchase of the tire or during that  
594 time, because they credit us at the time for that current price.

Q. They credit you with the price you paid for the merchandise, or the price that that comparable merchandise is being billed to Steepleton Tire Company at the time of delivery for?

A. Putting the stock movement number on there has not always been our practice. It has been in the last—recently because of competition in prices making it necessary, and because of price changes. In other words, prices change so often that it is hard to keep up with what you pay for one tire or for another.

Mr. Tinch: I wish to file at this time, if the Court please, the deposition which was taken of this witness, Mrs. Lauderdale, on January 3, 1962.

Mr. Mitchell: Do I understand you want to file it?

Mr. Tinch: Yes, just file it, part of the record.

Mr. Mitchell: Well, in the Clerk's office it can be filed at any time.

Mr. Ray: Treat it as read.

595 Mr. Mitchell: I don't know whether you need to treat it as read. You have got the witness right here. If there is some inconsistency here—

If it is filed, then we have no objection at all.

Mr. Tinch: Well, as I recall, the formalities with respect to filing were waived at the time the deposition was taken.

*Testimony of Mrs. Virginia Lauderdale*

Mr. Mitchell: Yes.

Mr. Tinch: So, for that purpose, we now lodge it with the Clerk, if Your Honor please, as a part of the record on the case—in the case, that is.

Mr. Mitchell: Let me understand what it is you want done.

Do you expect this to be evidence, now it is filed? Is that the connotation you had?

Mr. Tinch: I wish it to be part of the record in the case, yes, for such use as is legitimate of it.

Mr. Burch: Now, if Your Honor please, if Mr. 596 Tinch expects to develop at any time any inconsistency between the deposition of the witness, in fairness both to the Court and to the witness he ought to do it while the witness is on the stand.

Now, it would not be right after this witness has left the stand for Mr. Tinch to say, "Well, on her former testimony she said so-and-so," and developed some inconsistency of which there might be a perfectly rational explanation.

If that is the purpose of it, that ought to be made known now.

The Court: There is merit in counsel's observation at this time.

The pre-trial deposition ordinarily is used for impeachment purposes. And if you are saying now or have in mind now that there is a change in her testimony or it has varied in some particular, the fair thing would be, I believe, to call it to her attention now so she might clear it up, give her an opportunity to explain any discrepancy in her testimony.

Mr. Tinch: Oh—

The Court: You do have a right to offer that 597 pre-trial deposition.

It is admissible for any purpose, I believe under the rules.

*Testimony of Mrs. Virginia Lauderdale*

Mr. Tinch: Under the rules——

The Court: But in fairness, if there is some discrepancy, it is well to develop it at this time.

Do you claim, Mr. Tinch——

Mr. Tinch: No.

The Court: She hasn't testified but very briefly here.

Mr. Tinch: I am not offering it for that purpose, if Your Honor please, and as far as I know, there is nothing in the record inconsistent with her testimony today.

I think it does add clarification with reference to matters that have come into it, such as pricing.

And I had in mind next offering in evidence as an exhibit the price catalog concerning which Mrs. Lauderdale did make some comments and explanation at the time of her deposition.

598 The Court: Well, then, you are using that deposition in lieu of the examination at this time? Is that what your purpose——?

Mr. Tinch: That is the primary purpose.

The Court: That is your primary purpose?

Mr. Tinch: Yes, Your Honor.

The Court: To save time, for one thing.

Mr. Tinch: Rather than to retract and go over the same material that has been covered previously.

The Court: Well, that sounds reasonable.

By Mr. Tinch:

Q. For clarification, Mrs. Lauderdale, you have read your deposition and you have noted, I suppose, that the reporter listed you as Miss Virginia Lauderdale, did you not, on this deposition?

A. Yes, sir.

Q. But that is the deposition you gave, as reported, on January 3, 1962?

A. Yes, sir.

Q. Now, would you glance at this price catalog and

*Testimony of Mrs. Virginia Lauderdale*

determine whether that is the one which you referred to at the time of your deposition?

599 A. This appears to be the same one you handed me at that time.

Mr. Tinchler: I wish to offer that as Plaintiff's Exhibit number 12.

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 12, and same will be found among the exhibits in the cause.)

. . . . .

600 **DEPOSITION OF MRS. VIRGINIA LAUDERDALE.**

. . . . .

601 **Direct Examination,**

By Mr. Tinchler:

. . . . .

603 "A. We have what we call a daily summary of sales on which each invoice is listed and set up according to passenger tires, truck tires, service, or what it might be.

"Q. I will show you here a sheet which is called daily summary of sales and collections. This was made Exhibit No. 4 to Mr. Zaveson's deposition in Akron. Is your daily summary sheet similar to that?

"A. Yes, sir.

"Q. Is that the form that you use?

"A. Yes, sir.

"Q. I don't find any place on the daily summary sheet that you have identified for listing the customer's name. Is that done anywhere other than on the sales invoice?

"A. That is listed by invoice number. That sheet  
604 is listed by invoice number.

"Q. The invoice number is recorded on the daily summary sheet?

*Testimony of Mrs. Virginia Lauderdale*

"A. Yes, sir.

"Q. Then I take it you can go back from the daily summary sheet and pick out the various invoices and determine who the customer was and the unit price that was charged for the products he bought?

"A. That is correct.

"Q. Normally will one daily summary sheet be sufficient for a recapitulation of all your day's sales, or does it some times take more than one?

"A. It sometimes makes more.

"Q. And I believe the sales tickets then are kept for a period of several years?

"A. Yes, sir.

"Q. Are they filed by days or by weeks or by months or how?

"A. By months.

"Q. Could you give me just a rough approximation of how many of those daily sales tickets would be filed in an average month?

"A. It would vary, of course, according to the  
605 length of the month and the number of sales. That could run from 1,200 to 2,000.

"Q. It would be a great, big job for somebody if he goes to analyze all the sales tickets?

"A. Indeed it would.

"Q. You wouldn't volunteer for that job, of course?

"A. No, sir.

"Q. When is the daily summary sheet prepared, Miss Lauderdale, for the day?

"A. The following day, yes, sir.

"Q. And then I assume that all the sales which are not cash sales are written on some accounts receivable ledger?

"A. That is correct.

"Q. When is that done?

"A. Immediately following the listing on the daily summary of sales.

*Testimony of Mrs. Virginia Lauderdale*

"Q. That again, I take it, would be done from the sales ticket?

"A. That is correct.

"Q. The accounts receivable ledger will not show the unit price of any particular item sold, will they?

"A. No, sir.

"Q. Simply the customer's name, address, and the amount of the sale, is that the information?

"A. And the invoice number.

"Q. And the invoice number?

"A. And the date.

"Q. Do you yourself prepare the daily summary sheet or the accounts receivable ledger?

"A. No, sir, I do not.

"Q. Then each month a State of Tennessee sales tax return is prepared for the company, is it not?

"A. Yes, sir.

"Q. Who prepared that?

"A. I do.

"Q. Could you tell us what basic records you use in compiling the information for your sales tax returns?

"A. On the daily summary of sales, as each invoice is posted in a column on that, we set aside for sales tax. The sales tax is listed then per invoice, and that total is picked up at the end of the month.

"Q. Whereabouts on the daily summary sheet would you normally record the sales tax?

"A. This is the back side. Of course, this is a double sheet, as you understand, when it comes over like that, and since we have no—here is the column for sales tax.

"Q. Column 622, I take it, the sum of your entries in this daily summary sheet would have no sales tax?

"A. That is correct.

"Q. And that is simply left blank if there is no sales tax collected?



*Testimony of Mrs. Virginia Lauderdale*

“A. That is correct.

“Q. Do you issue the instructions to salesmen and service men with respect to what sales will involve a collection of a sales tax and what will not?

“A. Not daily. That, of course, was done at the time the sales tax went into effect, and then if there is any question, I try to determine whether or not—

“Q. And each new employee who makes sales would be instructed, I suppose?

“A. That is correct.

“Q. Do you review the sales tickets from time to time for the purpose of determining whether a sales tax has been properly computed and charged in appropriate sales and whether sales where no sales tax was collected was appropriate?

“A. I do occasionally, and the accounts receivable checks each of those at the same time she checks the invoice.

“Q. And is she instructed to be on the lookout for improper collection of state sales tax or failing to collect it?

608 “A. She is.

“Q. Now, just so we will both be talking about the same thing, I will hand you a form, State 3, which is the taxpayer's copy. This is not a completed form, but is just a form which we can talk about, the state sales tax return.

Mr. Mitchell: Pardon me. May I see that?

Mr. Tinker: Yes, surely. (Form examined by counsel.)

Mr. Mitchell: All right, sir.

“Q. And before I get into that, perhaps it would facilitate things if we take the company's copies of these sales tax returns which you brought with you.

“A. (Witness produces state tax returns and hands them to Mr. Tinker for examination.)

*Testimony of Mrs. Virginia Lauderdale*

“Q. Now, Miss Lauderdale, in Item 1 where you list gross sales and/or gross rental proceeds, do you get that figure from—or just let me ask you how do you derive the figure which you enter there for Item 1?

“A. From the daily summary of sales.

“Q. And do you make that tabulation, or does someone else?

“A. No, the accounts receivable bookkeeper, it is from her total.

609 “Q. And that would be a total of the daily summaries which have been made for the month?

“A. That’s right.

“Q. I notice here in the return for November, 1960, Item 2, cost of purchased products purchased on a resale certificate for use by you, an item of \$155.07. I don’t expect you to remember what that item is, but could you tell me the nature of that, what type of transaction that would be?

“A. I don’t recall offhand. Some places, of course, would charge the sales tax, and it would not be an item for resale. I believe that probably is small weights which go on a tire. The company does not charge us for those, and the weight is included in the price of balancing the wheels, so we pay the tax on the weights as purchased.

“Q. Now, in some of these returns, a sizeable amount is entered in Item 2. I note, for example, in August 1960 \$3,064.42. Might that be some product such as Steepleton general products sells and carries in stock for resale, but would be used in the business, such as tires on your own service trucks?

“A. No.

“Q. It would not have been included?

610 “A. No. sir.

“Q. Is there a place in this return for you to show such merchandise that is used in the business?

*Testimony of Mrs. Virginia Lauderdale*

“A. The next item is your use tax, any that we might use.

“Q. Then your company would include all of the merchandise which it uses in the business in this Item 3?

“A. That’s right.

“Q. And on that item, I take it, you then pay to the State of Tennessee the sales tax which would be the same amount that you would pay if you went out and bought those products from some other dealer?

“A. Our use tax, as the term might be.

“Q. It is a three percent tax the same as the sales tax?

“A. Yes, sir.

“Q. Then under Item 5 there are a number of classifications which are termed ‘allowable deductions’. 5-A is sales for resale and/or further processing, and can you tell me where you get the information that enables you to enter a total under that item?

“A. We carry a separate ledger on businesses which might have resale, for reselling merchandise for which they purchase.

“Q. Would that be businesses which have their own sales tax account number?

“A. Yes. We carry a file of all of them that have  
611 to have—in the file we have a copy of their exemption certificate from them.

“Q. And in the normal course of business, are there very many in that category?

“A. No, sir, we have very few.

“Q. When a sale is made to one of those dealers or businesses, does the salesman require that particular dealer to show his sales account number, or just how does the salesman know that on that account he is not charging sales tax?

“A. We have so few of them, it is easy for them to know. In most of the cases, it is just something a service

*Testimony of Mrs. Virginia Lauderdale*

station or something like that that might be picking up a tire or two for resale, and they come into the office and check with me on the file that we carry on exemption certificates.

“Q. All right. Item 5-E, sales and bonafide commissions, how do you determine which sales will be included in that category?

“A. There again we have so few of those it is easy. We attach a bill of lading to the back of any invoice that we happen to make a shipment out of town, which averages so few it would be easy for anybody to keep up with them.

\* \* \* \* \*

614 Q. Item 5-F is stated to be ‘Sales to states, counties, municipalities, or Federal Government’. Are those sales all tax exempt under the Tennessee State sales tax law?

“A. That is correct.

“Q. And no sales tax is collected?

“A. That is correct.

“Q. Would you explain under the other deductions which are listed on the back recapping sales?

615 “A. Recapping tires under the State of Tennessee is not taxable by sales tax.

“Q. Would it be different if the tires are recapped and put in stock by your company and then sold to customers?

“A. That’s right.

“Q. There is still no sales tax?

“A. No, there is a sales tax then.

“Q. There is?

“A. That’s right.

“Q. Do you have any sales in that category?

“A. Do we have any, or is there any shown on here, do you mean?

“Q. Does the company make such sales?

*Testimony of Mrs. Virginia Lauderdale*

"A. Yes, sir.

"Q. And where would those sales be included in your sales tax return?

"A. Well, they just would fall in the total before— after deductions come off.

"Q. All right. They are included in the gross sales and no deduction is taken, is that right?

"A. That's right.

616 "Q. Could you estimate the approximate percentage or proportion of your recapping business which would fall into that category?

"A. No, sir, I could not.

"Q. Would it be a small percentage or a large percentage of your recapping business?

"A. I would say small.

"Q. Your next item on other deductions is 'WB and Alignment', which I take it to be wheel balancing and alignment?

"A. That's right.

"Q. Is that also exempt from the state sales tax?

"A. Yes, sir, under the State of Tennessee law.

"Q. And service sales, what does that include?

"A. Like a charge for making a service trip.

"Q. Miss Lauderdale, in your position as office manager do you assist the salesmen or any others in the organization in computing discounts that are allowed on various sales of tires and tubes?

"A. Not as a rule.

"Q. Do you from time to time do that?

"A. If the specific emergency situation arose and I had to, would be about the only occasion.

"Q. You are familiar with the price lists, the code prices and how to determine which is which?

617 "A. Yes, sir.

(Off-the-record discussion.)

*Testimony of Mrs. Virginia Lauderdale*

"Q. Is this the type of price list which is normally used in making sales at your establishment? (Showing witness a booklet).

"A. Yes, sir.

"Q. Can you from looking at that tell whether that was in effect during 1960?

"A. The dates are shown on the price list.

"Q. And the date on Page 1 of the sheet marked 210-A shows an effective date of February 16, 1960, is that right?

"A. Yes, sir.

"Q. Just turning to Page 2 of this sheet that is designated 210-A, I notice back here rayon which has been written through and General Air Tyrex is shown, tubeless, first. Is that a first line tire of the General Tire Company?

"A. It is.

"Q. And 40 percent has been written in there. Is that a discount, or tell us what the 40 percent is.

"A. I do not know who wrote it in there.

"Q. Well, I don't either, but is the 40 percent a normal figure for you to have written on your price list?

"A. It is not a normal figure, no, sir.

618 Mr. Mitchell: Let the record reflect, if you are not going to make that an exhibit, that the 40 percent to which you referred is written in in either pen and ink or something other than or contrary to the printed material.

Mr. Tinker: Yes, this 40 percent is written with red pencil.

"Q. Going down to the Item 750.14 4-ply, what is the list price of that friction tubeless tire?

"A. \$34.30.

"Q. Now, can you tell me from that what the code price is?

*Testimony of Mrs. Virginia Lauderdale*

“A. This is the code price (indicating).

“Q. You are pointing to Figure 27E79. Now, is that a price of \$27.79 indicated for the code price?

“A. That’s right.

“Q. And by the same token, 800.14 tire, the list price, \$37.60 would have a price of \$30.46?

“A. That’s right.

“Q. Now, is that code price, Miss Lauderdale, the price that one of your dealers would pay to Steepleton General Tire Company for this tire?

“A. That code price shown on there is General’s code price. We do not use that.

619 “Q. Would you use a lower figure or a higher figure than that in selling to one of your dealers?

Mr. Mitchell: I beg the form of the question at this point. I do not know that it is going to establish by this testimony—certainly not by this lady’s testimony—that they have dealers.

Mr. Tinscher: I believe she has already testified about these sales for resale such as a service station. That is what I had in mind.

“Q. A sale to a service station, would the price to the service station be greater or less than this code price?

“A. It would possibly be less.

“Q. Now, would your price to United Taxi Company, for example, be greater or less than this code price if they bought that tire?

“A. Well, as I remember the code from just looking there, I would say it would be a little less than that, yes, sir. I didn’t notice the difference in that; I don’t pay much attention to the code since we do not use it.

“Q. Do you use the list price in making sales to average individuals who would come by to buy one tire or a set of tires for their own personal automobile?

620 “A. That’s right.

“Q. You use the list price?

*Testimony of Mrs. Virginia Lauderdale*

"A. That's right.

"Q. Do you have customers who buy tires— (interrupted).

"A. I didn't—excuse me a minute—I didn't mean that they were going to pay that price. There may be a discount allowed from that, but we use that as the base.

"Q. In what way would the discount be determined for an individual customer?

"A. Mr. Steepleton and the salesman determine the discount. That doesn't come under my jurisdiction.

"Q. You would perhaps look at the ticket after it was done?

"A. Yes, sir.

"Q. And in checking those tickets, can you say what the average or a normal basis of discount for the individual tire purchaser has been?

"A. You mean can I take the ticket and figure it?

"Q. No. I mean do you recall what was a normal discount for the individual purchaser?

"A. There isn't such a thing as a normal discount in the tire business. It can be one thing one time and one thing another, according to whatever the situation happens to arise, the competition. So many things can determine that cost. There isn't such a thing as the one price, according to the way I would see it.

"Q. In other words, even though this same price list might be in use for several weeks or months, from day to day this figure might be used in working a discount from the list price?

"A. It is entirely possible.

"Q. Was that the practice in 1960, as you recall it?

"A. Well, it is always necessary, I would say, in the moving of a commodity of this kind.

"Q. Now, from the same price list, I will turn to Page 2, or the sheet marked KC 133 relating to truck tires and



*Testimony of Mrs. Virginia Lauderdale*

tubes, and this has an effective date of December 7, 1960. Let's go over and take one of the common sizes of your truck tires, 1020 HCR Caravan being an item of truck tires that you would sell frequently?

"A. Yes, sir.

"Q. For a 12-ply tire of the 1020 HCR Caravan, a list price of \$196.95 is shown, a code of 121T58. Does that code indicate a code price of \$121.58?

"A. Yes, sir.

622 "Q. That again, I take it, is General Tire Company's code price and not necessarily the price at which Steepleton General Tire would sell this?

"A. In truck tires we do use the code.

"Q. You do?

"A. Some in determining the prices.

"Q. Now, would that code price be the normal price that Steepleton would have sold this tire in December of 1960 to an individual truck operator?

"A. You are using the term 'normal' again to describe prices, and in the tire business there isn't a normal price.

"Q. Can you explain the manner in which the code price is used as you have indicated?

"A. Well, the code can be used as the base, and there are times when you might use one 10 percent, three 10's, four 10's. As I said, it has to be according to the situation, the customer, competition, any dozens of things can influence the price that is necessary to meet in order to sell.

"Q. But in any event, the code price, \$120.58, rather than the list price of \$196.95 would be the take-off point?

"A. There are times when the list price is used as the determining basis.

623 "Q. Do you know what determines whether the list price or code price is used as a starting point?

"A. No. There again, as I said, the pricing doesn't

*Testimony of Mrs. Virginia Lauderdale*

get too much in my line. I just—I can check the invoices afterwards and tell what has been done, but so far as determining the price, I don't do that.

“Q. In the same day might you see an invoice where it was figured at three 10's from the code price and another invoice where it was figured four 10's or five 10's from this list price?

“A. It is possible.

“Q. You wouldn't be surprised to find that happened in any particular day as you looked over the invoices?

“A. It could happen.

“Q. Now, would you be able to say whether or not one type of customer got his purchase price figured from the code price, whereas a different type of customer had his figured from the list price?

“A. If I take it and figure it, I could determine it.

“Q. Would you be able normally to look at the invoice and tell which way it was done?

“A. You mean just looking at the invoice?

624 “Q. Yes, from the price that was put on there could you tell whether the selling price had been computed from the list or from the code?

“A. Generally speaking, I should from looking at so many of them.

“Q. Is it the usual thing for that sales ticket to show either the code price or the list price and then show a discount?

“A. No, sir. The discounts are, as a rule, not shown on the invoice.

“Q. Usually the invoice shows only the price to the customer?

“A. That is correct.

“Q. Plus any taxes and so forth?

“A. That is correct.

“Q. Do you know of any short cut method by which

*Testimony of Mrs. Virginia Lauderdale*

the amount of discount on any particular sale can be determined by looking at the invoice?

"A. No, I don't believe I do.

"Q. So far as you know, would it be necessary to take the invoice and compare it with the price list that was in effect at that particular time in order to determine what discount was allowed?

625 "A. Yes, I would have to do that.

"Q. I am afraid Mr. Mitchell will, too. Miss Lauderdale, where in your sales tax returns do you show the receipts which Steepleton General Tire obtained from General Tire & Rubber Company in the form of commissions on national account sales?

"A. I don't understand that.

"Q. Do you list on your sales tax returns the commission which Steepleton General Tire Company obtains from General Tire & Rubber Company for handling the business of the national accounts?

"A. No, sir.

"Q. That is not included at all?

"A. No, sir.

"Q. Where do you include that in your gross earnings or gross receipts to show the income?

"A. Commission earned.

"Q. What books or records will reflect that?

"A. It is carried on the daily summary of sales and then carried forward to the general ledger on commissions earned as set forth under added income.

"Q. And I assume that it is included in your gross revenues for Federal income tax purposes?

626 "A. Yes, sir. That is only a commission and has no bearing on the sales.

"Q. All right. Would you point out on the daily summary sheet where it is carried?

"A. Over here under miscellaneous debits and credits.

*Testimony of Mrs. Virginia Lauderdale*

She lists it here in the account number above the name 'Commission earned' and the credit to 'Commission earned'.

"Q. In sales to the state, the City of Memphis, and various counties, I understand that General Tire & Rubber Company pays your company a commission over and above the amount which you collect from the county or city or the state for a sales tax. Is that commission shown on your daily summary also as a commission earned?

"A. Not on the daily summary, no, sir.

"Q. Where would it show in your records?

"A. On this recap of the General Tire invoices.

"Q. Is it included in your over-all gross receipts for Federal income tax purposes?

"A. Yes, sir.

"Q. Is it listed or treated as a commission rather than as a profit?

"A. Yes, sir.

"Q. But it is carried in a different account than commissions which are obtained from servicing the national accounts?

627 "A. No, they are the same.

"Q. In the same account?

"A. Yes, sir, all under commissions earned.

"Q. What other types of transactions by Steepleton Tire Company result in commissions that would be listed in that account?

"A. I don't believe I think of any other, tax received from General or commissions on delivery for national accounts. That is the only two I think of offhand.

"Q. Are there some in a special category where sales are made with the approval of General Tire Company at less than your price, your billing price, for example, where a competitive price has been approved in advance and

*Testimony of Mrs. Virginia Lauderdale*

then a 10 percent allowance is made there to adjust your price? Do you know whether that is carried as a commission here?

"A. No, that is only to adjust the price, and it is just credited to the purchase price.

"Q. That is credited to your account with General Tire Company?

"A. That's right.

"Q. By General Tire?

"A. That's right.

"Q. Is that in any way carried as income by Steepleton Tire Company?

628 "A. If they give us back only the difference in the cost, it would just be cost equalization and would not have been any income.

"Q. Among the national accounts which your company serves, I believe are some manufacturers on which your commission is lower than fleet accounts, is that right?

"A. Yes, sir.

"Q. Do you also supply any oil companies under the national account arrangement?

"A. No, sir, not that I know of.

"Q. To go back just a little bit, I believe I understood from your testimony that your sales for resale include only those to dealers who have filed with you a state sales tax account number, is that correct or not?

"A. If they are purchasing new merchandise, they would have to. Occasionally maybe this same service station might have a tire recapped on which there is no sales tax involved. They might not have one on file.

"Q. And are you able to sell to various used car dealers, for example, recapped tires which they will place on cars they want to sell without having to list that as a sale for resale?

"A. You mean in selling to used tire dealers?

*Testimony of Mrs. Virginia Lauderdale*

“Q. No, used car dealers.

629 “A. And what did you say about them?

“Q. Would you list that sale under Item 5-A as a sale for resale, or would you list it over on the back as a recapping sale?

“A. Some used car dealers prefer to pay the tax, because they are selling the car as a unit and not the tires separately. I don't know but one or two that we sell like that, and I think the best I recall is they prefer to pay their sales tax because they are selling the car as a unit and the tires, not as a tire. If they don't pay the sales tax, it would come under the ones for resale.

“Q. Do I understand correctly that if you sell a recapped tire to an individual, you do not charge a retail sales tax?

“A. A recapped tire?

“Q. Yes, from stock.

“A. Yes, we do charge.

“Q. You do charge sales tax, and if you sold such a tire to a used car dealer who preferred to pay the tax, he would pay it, but if he had an account number, then you would sell it free of sales tax, is that correct?

“A. That is correct.

630 “Q. In other words, your category of sales for resale as shown in Item 5-A would not necessarily cover all sales by Steepleton Tire Company of merchandise which was intended to be resold?

“A. I don't follow you.

“Q. You have some merchandise which you collect the sales tax on which is still intended for resale, is that correct? For example, to used car dealers who are going to put them on a car and sell them?

“A. They consider they are purchasing the tires to go on an automobile and they are selling the car. They are not selling the tires as such; therefore, it is not for resale.

*Testimony of Mrs. Virginia Lauderdale*

“Q. You would not include it in this column under 5-A?

“A. No.

“Q. As a sale for resale?

“A. No.

“Q. And that sometimes happens, I assume, from the way you have described the business?

“A. I can remember of one instance that brought that to mind.

“Q. And in the normal course of your business, if it can be used as normal in this manner, you do make  
631 sales to dealers who do not pay a sales tax on tires which will be put on vehicles and resold?

“A. Of course, once we sell the tire, what they do with it, we have no way of knowing.

“Q. For example, Road Builders Equipment Company, I believe they take in used equipment on sales of new equipment, and then they resell their used equipment. Now, in some instances when they have recapping done of tires for their used equipment, would you charge them a sales tax on such tires or not?

“A. If they have the tires off the equipment recapped, there is no sales tax on recapping.

“Q. Then that would be listed under your recapping sales, would it not?

“A. That is right.

“Q. And among your recapping sales then would be included the tires such as those for Road Builders Equipment Company which were intended to be put on used equipment and resold?

“A. Well, recapping does not involve sales tax one way or another; it wouldn't matter.

“Q. Well, now that was a long way around to get around to the question which you didn't understand a moment ago, that some of the sales to purchasers  
632 which are to be resold are not included and, of course, are not required to be included in your

*Testimony of Swayne Latham*

Item 5-A on the sales tax return. Now, could you confirm that?

“A. Well, of course, if Road Builders—you are using that as an example—if they sent some tires up there to be recapped and just recapped and returned to them, whether they put them back on this used equipment, sales tax is not involved one way or another, so, of course, I would have no way of knowing, and, of course, it really doesn't matter to us whether they are going to resell them or not because it is just a matter of recapping tires and returning them to them, and whether they put them back on the used equipment, I wouldn't have any way of knowing.

“Q. And if they are put on used equipment to be resold, that would still not be included in your 5-A, Item 5-A on your sales tax return, would it?

“A. Well, I am afraid I am not making it clear. I wouldn't know what they do with them or whether they sell them or what. Of course, when I make that out for that month, no, it is not. We just recapped some tires, and we recapped them and returned them.

“Q. That is the answer I wanted to get, but if it  
633 did happen, it would not have been included in your column for sales for resale?

“A. No, it would be under recapping.

. . . . .

637

**SWAYNE LATHAM,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Burch:

Q. You are Mr. Swayne Latham?

A. Yes, sir.

Q. What is your business, Mr. Latham?



*Testimony of Swayne Latham*

A. What is that?

Q. What is your business?

A. Tire business, retail tire business.

Q. How long have you been in that business?

A. About forty-two years.

Q. Just for the record, give us some of your history in the tire business, your background, the various phases that you know about that you have been in.

A. Well, I went with Goodrich Company in '21 as a tire salesman. Then I was branch manager for them from '24 to '27.

At that time I went into the retail tire business, had one place at Union and Cleveland for a good many years, and during the course of time operated about six or 638 seven different businesses.

We eventually have closed them or sold them to Goodrich Company, until at the present time we have one small business out in North Memphis.

Q. You operated for many years a very large store right there on Union and——?

A. We had a good sized establishment at Union and Cleveland, then at Second and Vance. We were doing about a two million dollar retail business.

Q. Two million dollars a year?

A. A year.

Q. What I want to ask you about principally—you have covered it already—and that is the nature of the retail business.

Do you think you know what is retail as distinguished from wholesale, as considered in the tire industry?

A. I would say so, yes.

Q. You have had an opportunity to learn it the hard way, have you not?

A. Yes.

Q. Mr. Latham, what is the distinguishing difference

*Testimony of Swayne Latham*

between retail and non-retail or wholesale in the tire  
639 Industry?

A. Well, in our particular method of bookkeeping—and I think it is accepted pretty well in the industry—that if we made a sale to another dealer, a smaller dealer, for the purpose of resale, and in breaking down our sales we considered that a wholesale sale.

Everything else was either commercial, or national account, or retail, or Federal or municipal government.

But the only thing that we carried at all as wholesale was the sale to another dealer, where we had to have an exemption certificate, and he makes the sale to the ultimate consumer.

Q. Is everything else retail?

A. It is in our method of keeping books, yes.

Q. Now, is your method general in the industry, as far as you know?

A. I would say so, because we adopted it from the Goodrich Company from experience, and they operate some five or six hundred stores.

Q. So, if you would sell a tire to Joe Doakes Tire Company for resale, that is as wholesale?

A. Yes, sir.

Q. If you sell a tire to XYZ Tire Company for  
640 resale, they furnish you with an exemption certificate so you didn't have to collect sales tax, that is wholesale, right?

A. That is right.

Q. But if you sell to Gordons Transport Company to put on their truck and use, that is retail?

A. Right.

Q. If you make a delivery to—let's say the Greyhound Bus Line through a national account, that is retail?

A. Yes.

Q. So, everything that is to be resold is wholesale, and everything that is to be used by the purchaser is retail?

*Testimony of Swayne Latham*

A. That is what I understand.

Q. Now, do you know of any other classifications of wholesale and retail that has ever been created in the tire industry in the thirty-eight years which you have been in it?

Mr. Ray: Forty.

Mr. Burch: Forty.

A. No, other than the fact that we do occasionally—there have been times through the years when the manufacturer carried an account on our books. In other words, we won't solicit the account. We will just usually, in other words—

Q. That is what you call a national account?

A. That is right.

641 Q. That is not a sale of your own?

A. No, it would be a sale by the manufacturer, and we simply act as delivery agent and are given a commission, a commission for delivering the sale.

Q. As a matter of fact, many times in doing so you did not even know what the price charged by the manufacturer was, did you?

A. We knew it many times was cheaper than we could buy them.

Q. But you could not collect sales tax on this because—

A. We could not buy them at that, I think.

Q. You weren't concerned with credit or price?

A. We weren't concerned with credit or price, just tell us to make deliveries of so many tires, such and such tires.

Q. Do you know Mr. Steepleton of Steepleton Tire Company?

A. I do.

Q. Is that a competitor tire company, has been a competitor tire company during the many years you have been in business?

*Testimony of Swayne Latham*

A. Plenty of them.

Q. You have made it a practice to know something about your competitors and the way they operate?

A. Yes.

Q. Are they or not a retail establishment as considered in the tire industry?

642 A. We consider them strictly retail, yes, sir.

Mr. Burch: All right.

**Cross-Examination,**

By Mr. Tincher:

Q. Are you still affiliated with the Goodrich Tire & Rubber Company, Mr. Latham?

A. What is that?

Q. Are you still affiliated in your business operations with Goodrich Tire & Rubber Company?

A. We handle Goodrich tires, yes.

Q. How big a territory does your company operate in?

A. It is about a little three or four block community.

Q. And do a two million dollar business a year?

A. No, that was when we had several big places. They have all been sold to the Goodrich Company.

Q. Oh. That is not the territory where you operated as a two million dollar concern.

Now, Goodrich Tire & Rubber Company operates a number of retail outlets of its own?

A. That is right.

Q. And how big an operation do you have at the present?

A. About a quarter million, including appliances,  
643 television, radios, and such.

Q. In your present operation, do you carry any auto parts and accessories, and so forth?

A. We carry a few incidental small stuff as feeder to bring people into the place.

*Testimony of Swayne Latham*

Q. Spark plugs, seat cushions, batteries, windshield wipers, and seat belts, things of that nature?

A. We do.

Q. Do you at present have any sub-dealers to whom you supply tires?

A. No.

Q. Do you have any fleet accounts at this time?

A. No.

Q. Do you supply tires to any national accounts?

A. No.

Q. The Goodrich Tire & Rubber Company is of course, I presume—is now handled through the Goodrich store?

A. Goodrich store.

Q. How long has it been since you supplied a national account of Goodrich Tire & Rubber Company?

A. We sold our last sizeable business to them in 644 1958. That was at Union and Cleveland.

Q. Is your business at present primarily one of dealing with individual owners of passenger vehicles?

A. Yes.

Q. This purchasing system that you formerly used, in which, as I understand your testimony, you carried those sales to dealers and sub-dealers as wholesale sales, and all other sales as retail sales—was that bookkeeping system set up by the Goodrich Tire & Rubber Company for you?

A. I believe so. Yes, we adopted their method of bookkeeping.

Q. Now, in that system which you described, you mentioned the fact that there were commercial accounts, national accounts, and Government accounts, and so forth.

Were those carried in a break-down under this broad grouping that you have made of consumer sales?

A. Strictly, our breakdown would strictly have been retail, either passenger or truck tires—retail tire sales, either passenger or truck.

*Testimony of Swayne Latham*

Q. In your bookkeeping arrangement, was the ledger sheet on which you made such a report or monthly  
645 report form headed in any of its columns or divisions as retail?

A. Certainly, we have retail tires, passenger cars, retail trucks, wholesale passenger, wholesale truck.

Mr. Tincher: Yes, sir.

A. (Continuing) Just speaking strictly of the tire business.

Q. Those divisions or break-downs were shown on the forms?

A. Every statement that we got up, which was once a month, an operating statement and a balance sheet and a sales control.

Q. With reference to the truck tire sales, did you have a commercial listing or a heading for such sales to be entered?

A. No, it was strictly retail sales.

Q. Did you at the time you were operating on this larger scale, before you have sold your multiple outlets that you operated, did you have any commercial tire salesmen who went out and called on various businesses?

A. We did.

Q. Were they termed commercial salesmen in your organization?

A. Commercial salesmen.

Q. Did you at the same time have some salesmen at your place of business who waited on the drop-in trade?

A. Yes.

Q. Were they termed your retail salesmen?

A. Yes, that is right.

646 Q. Did those retail salesmen make any sales of truck tires?

A. Oh, yes, certainly.

Q. Did they make any sales to the fleet account customers that you had?

*Testimony of Swayne Latham*

A. Yes. There was no difference when you say commercial salesmen, because we gave them certain lists of commercial accounts to call on, they are away from the store all the time. When they are in the store, they operate exactly the same as retail salesmen at the store. In fact, they would relieve the inside people for lunch and different things and operate together.

Q. In other words, they were familiar with all phases of the business?

A. That is right.

Q. But I take it your retail salesmen would not as a rule be sent out to make calls on fleet customers?

A. No, they primarily are in the business. If we would get a quick call, and somebody wanted to talk to a man and could not reach a commercial salesman, we would send one of these men out. They were of course qualified and know the line.

647 Q. Did the Goodrich Company supply you with—  
for the fleet accounts—the commercial salesmen operating out on the field to call on customers—did Goodrich Tire & Rubber Company supply you with suggested prices and tire catalogs for the use of the customers?

A. There have always been list prices, of course, list price for dealers and prices which were—then, well, the more trucks—and here is the part of it, for the tires, if a man had twenty trucks he would get this price, if he had fifty he would get another price.

Q. And those arrangements, I take it, provide for discounts to be given from list price to those fleet account customers?

A. Yes, there was no—well, there have been a lot in forty years, been all sorts of prices and sheets. And at one time we had all those commercial price lists, different color to commercial. What you are doing is take the retail price and discount from it, if you say so many tens, and got the basis of nine tens and a five.

*Testimony of Swayne Latham*

Q. Multiple percentages of five or ten percent from the list price?

A. Right.

Mr. Tincher: I believe that is all.

648

**Redirect Examination,**

By Mr. Burch:

Q. Mr. Latham, during all those years, whatever the discount system, whatever the prices paid, whatever the color of the price list, if it has been used it has been classed as a retail sale, has it not?

A. That is right.

Q. And not retail is wholesale sale?

A. That is right.

Q. Was that system prevailing before the year 1949, would you know?

A. Oh, yes, I would.

Q. It has been for the whole forty years, as far as you can remember, has it not?

A. That is right.

Q. It is nothing that the industry has thought up to answer Mr. Tincher in this or any other lawsuit, is it?

A. No.

Q. As a matter of fact, the classification that the tire industry uses is exactly the same as the State of Tennessee in its sales tax law uses, is it not?

If it is for resale, you don't collect it. If it is for use, you have got to collect it.

649 A. I would say so, yes.

Q. Now, you have been in this business forty years, Mr. Latham. You remember back in '30 and '31 and '32, when we were all sort of broke and the Government had the blue eagle and the NRA, do you remember that?

A. I do.

Q. You remember that?



*Testimony of Swayne Latham*

A. I do.

Q. You remember back in the NRA, the Government encouraged the people in industry to get together and form what they call industry codes, do you recall that?

A. I do.

Q. Do you recall that the classification of NRA, and that is your National Recovery Act, was exactly the same issued by the industry, that if it was to the user it was retail, and if it was to a reseller it was wholesale?

A. I couldn't say positively, but that is my recollection, because we haven't changed our system.

Q. Well, in forty years, have you ever known any classification in the industry other than if it is purchased by a user it is retail, and if it is a reseller it is wholesale?

A. That is my understanding of it, yes.

Mr. Burch: That is all.

650

**Recross-Examination,**

By Mr. Tincher:

Q. One further question on that point, Mr. Latham.

If I understand your theory, that you state there had been this commercial classification, which included sales to fleet accounts, national accounts, and governments?

A. That is right.

Mr. Tincher: That is all.

**Redirect Examination,**

By Mr. Burch:

Q. I did not understand you to say that a commercial sale is other than a retail sale.

A. It is—the last sale is a retail sale.

\* \* \* \* \*

*Testimony of William O. Sturdivant*

651

**WILLIAM O. STURDIVANT,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Burch:

Q. Would you state your full name for the record?

A. William O. Sturdivant.

Q. Mr. Sturdivant, what is your business?

A. I am employed by the Memphis Publishing Company, the publishers of the Commercial Appeal and the Press-Scimitar.

Q. What is the average daily circulation of both of those papers, Mr. Sturdivant, just roughly?

A. Combined, three hundred sixty-nine thousand.

Q. Are those papers the principal daily advertising media in this area?

A. That is right, sir.

Q. Now, do you have different rates for wholesale and retail establishments?

A. Yes, we have what we call the general advertising rates and retail advertising rates. That is in addition to classified rates.

Q. Now, what generally classifies a retail establishment to entitle it to take that rate?

Now, before you answer that, let me withdraw that  
652 question.

Is the general rate higher or lower than the retail rate?

A. The general rate is higher—considerably higher in most cases.

Q. So, to get a cheaper rate, you have got to satisfy the Commercial Appeal or Press-Scimitar, and particularly Mr. Sturdivant, that you are a retail establishment to entitle you to a cheaper rate, do you not?

*Testimony of William O. Sturdivant*

A. That is right.

Q. What does it take to satisfy you, or how do you make the classification as to what is a retail establishment?

A. Well, we define a retail advertiser as one who operates a retail store or a group of retail stores operating under the same name or association.

Q. Now, in the advertising part of the tire business, have you accepted the Steepleton Tire Company as a retail establishment?

A. Yes, we have.

Q. And does it advertise and does it get the cheaper retail rate?

A. That's right.

653 Q. Now, Mr. Sturdivant, I have here an audit report of the Commercial Appeal and the Memphis Press-Scimitar for the twelve months ending March 31, 1961, and I will ask you to look at it, and look at the second page of it particularly.

Now, before I will ask you this question, I will ask you one that sounds remarkably stupid, but we frequently have to ask it.

Memphis is in the State of Tennessee, is located in the southwest corner of the State of Tennessee, is it not?

A. That is right.

Q. And it is within half a mile of the State of Arkansas, and within three or four miles of the State of Mississippi, is it not?

A. Yes.

Q. Now, how is the retail trading area of the City of Memphis described in the audit report of your papers that we have in this area?

A. Well, it is described as the—first, as the retail trading zone of Memphis, and includes approximately thirty-three counties located in West Tennessee and North Mississippi and East Arkansas.

*Testimony of William O. Sturdivant*

Q. Would you make that an exhibit—Exhibit F.

654 A. If you like, I could read the boundaries.

Q. Will you read it, now.

A. All right. Our agreed rates I referred to, which extend north to Blytheville, Arkansas, northeast to Tiptonville, Tennessee, east to Bolivar, Tennessee, southeast to Pontotoc, that is, to Nozel, Mississippi, southwest to Gunnison, Mississippi, to Mellwood, Arkansas, also to Forrest City, Arkansas, northwest to Jonesboro, Arkansas. And it includes, with the exception of the city zones in Tennessee, the counties of Crockett, Dyer, Fayette, Hardeman, Haywood, Lauderdale, and Gibson, Shelby, Tipton. And in Madison County, we consider the county division there Huntersville and Medon.

In Arkansas, the counties of Craighead, Crittenden, Cross, Lee, Mississippi, Phillips, Poinsett, and St. Francis.

In Mississippi, the counties of Alcorn, Benton, Coahoma, DeSoto, LaFayette, Marshall, Quitman, Tallahatchie, Tate, Tippah, Tunica, Yalobusha.

In Union County, Beats 1 to 4, inclusive.

In Pontotoc County, Beats 1 to 4, inclusive.

In Bolivar County, Beats 1 and 3.

Q. Now, Mr. Sturdivant, just ask you a fact you know better than I, and around the whole area hereof,  
655 not to ask you all the details, you see, but considering you called out Blytheville, and Coahoma County such as Clarksdale is the county seat, and generally like that, would you say that the retail zone was a radius roughly one hundred miles from Memphis? Would that be close, Mr. Sturdivant?

A. Fairly close. In some cases it would be somewhat less, I mean, as far as going over in Arkansas is concerned.

Mr. Burch: You may question.

*Testimony of William O. Sturdivant*

**Cross-Examination,**

By Mr. Tincher:

Q. Mr. Sturdivant, would you give us a few examples of the type of wholesalers that carry advertising in your newspapers at the higher rates you have mentioned?

A. Well McGregor's would be one. This is appliance distributors.

Mr. Tincher: Yes, sir.

A. (Continuing) McDonald Brothers and Shobe, Incorporated. They carry what—carry our general rate, as they are distributors.

Q. Now, would you state first whether any of those have retail outlets as well as being in the wholesale distributing business?

A. As far as I know, they have no retail outlets that they own themselves. They sell to regular appliance dealers.

Q. To the extent that the appliance dealers are identified with their particular brand name of products, I take it the appliance dealer would get some profits from their advertising.

A. That is right.

Q. Do you have any advertisers who are identified, in so far as your department of the newspaper is concerned, as both engaged in wholesale and in retail distribution?

A. Well, that would be rather difficult.

Q. For example, does the Firestone Tire & Rubber Company—

A. Oh—

Q. (Continuing) —carry advertising in your newspapers?

A. Yes, we carry advertising from the Firestone stores, which run retail, and we occasionally carry advertising from Firestone Rubber Company which carries the general advertising rate.

*Testimony of William O. Sturdivant*

Q. All right. When you carry it for the Firestone stores, would more than one of those stores be listed and named in the advertising?

657 A. Well, they generally carry—Firestone stores will carry their addresses under there at the bottom of the advertisement.

Q. Yes, sir. And there will be a number of such outlets, won't there?

A. Yes, sir.

Q. Now, are you aware—

Now, first let me ask you whether those advertisements are carried on your newspaper under the retail category at the lower rate?

A. Yes, advertisements of that kind are.

Q. Well, are you aware that those Firestone stores not only are selling to members of the general public, but are also distributing to sub-dealers such as filling stations and other dealers and garages that are in another category?

A. We interpret the Firestone stores as being retail establishments and accordingly accept their advertising at the retail rate.

Mr. Burch: If Your Honor please, I don't believe there is a line of proof in this record that any Firestone store distributes to resellers. There may be.

Q. The next question, Mr. Sturdivant, is: In  
658 carrying those advertisements for the Firestone stores, are you nevertheless aware that those stores are a part of the Firestone distribution system, and that they do sell tires to various service stations and garages for resale?

A. No, I don't believe that we are aware of that at all. And—

Q. Would it make any difference in the rate you would charge them if you were aware of that fact?

A. Well, if other stores were listed other than the—

*Testimony of William O. Sturdivant*

what we call the Firestone Service Stores, and if they listed all their dealers all the way through, such an item would take what we call our general rate.

Q. But as long as they list only the stores that carry the name Firestone store, then I take it you are willing to carry their advertisement at the retail rate?

A. Yes, that is right.

Q. Would the same thing be true with reference to Goodrich Tire & Rubber Company stores?

A. That is right. We carry advertising for them under the name of Goodrich Service Store, I believe, or Goodyear Service Store. I forgot which one you mentioned there.

Q. And both the Goodrich stores and Goodyear stores are able to carry their advertising in your newspapers under the retail rate, notwithstanding that in addition to selling to members of the general public, they also may sell to service stations and garages for resale?

A. Yes, sir.

Q. Now, are you aware that Steepleton General Tire Company makes sales of tires to dealers and garages for resale?

A. No, we are not aware of that. We consider Steepleton Tire Company as being a retailer, and have always considered him that way.

Q. Will you continue to carry Mr. Steepleton's advertisements and those of Steepleton General Tire Company at the retail rates, even though you learn that some portion of his business is made up of sales to dealers for resale?

A. Yes, I believe the appearance of the ad in the paper runs over the Steepleton signature—the tire company, and at his address, and as far as we are concerned that advertisement is inviting the public to come and buy tires at the Steepleton Tire Company.

*Testimony of Willicm O. Sturdivant*

Q. Yes, sir. In fact, the type of advertisement which Steepleton General Tire Company runs in your paper is calculated to reach the members of the general public and to induce them to come to the place of business and buy tires, isn't it?

A. That is right.

Q. And the type of advertisement is not in your experience as an advertising man calculated to build the Steepleton Tire Company business with fleet owners who may buy tires for their trucks or earthmoving equipment, and so forth?

A. Well, as far as the fleet owners are concerned, we really don't understand about that phase of the business. But we consider Steepleton strictly—I mean under the retail—under our interpretation of what retail and general—

Q. Yes. In fact, I noted in your paper this week a rather large—perhaps quarter page or eighth page advertisement by Steepleton General Tire Company.

Are you familiar with the one that has been currently running this week?

A. Not particularly. I have noticed the ad in there. I believe he advertises most every week in the paper.

Q. The one in this week has relation to passenger tires exclusively, has it not? Are you aware—?

A. No. I noticed that. I always go through the paper. I noticed he had an advertisement. I doubt if I completely read the advertisement.

Q. Well, if you remember, would it be correct to say that generally speaking and predominantly the advertisements which the Steepleton General Tire Company has been running in your newspaper—your two newspapers—have been for passenger cars rather than for trucks and heavy equipment tires?

A. I am sorry, I am really not aware—generally prob-



*Testimony of William O. Sturdivant*

ably would for passenger tires, but I am not sure whether the advertisements carried in our—I am with the newspaper, and must state I am a rather poor reader of newspaper ads. I look at the size of it and all that, but a lot of times don't read too carefully except when I am ready to buy something.

Q. I feel sure you have in your department others who work with that, with the detail and make up of the particular ad.

A. That is right.

Mr. Tincher: That is all.

**Redirect Examination,**

By Mr. Burch:

Q. Mr. Sturdivant, you know the meaning of the word "preponderately", don't you?

A. Yes.

Q. You would agree with me that a man could take  
662 a drink and not be a drunkard?

A. That is right.

Q. Similarly, a retail establishment can make a wholesale sale but still be preponderately a retail establishment?

A. Yes.

Q. Now, is it your understanding, and do you charge accordingly, that Steepleton Tire Company is preponderately a retail establishment?

Mr. Tincher: Objection, if Your Honor please. He is asking, as I understand—

Mr. Burch: I sure am.

Mr. Tincher: And that unless he lays the predicate for what this understanding is based on—

Mr. Burch: The test is known in the industry. And the gentleman who is handling the advertising of the industry and knows in the industry it is retail, as such—and charged accordingly as a retail establishment, that is a test established by the law.

*Testimony of Richie I. Brunskill*

The answer does not suit the Government, but that is the law there.

663 The Court: The Court will permit him to answer.

Q. Is it known and accepted by the industry, your advertising committee, so far as the use cited to you, as a retailer?

A. Yes, I would say that definitely in our definition of Steepleton Tire Company.

Mr. Burch: Thank you.

. . . . .

664 **RICHIE I. BRUNSKILL,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Burch:

Q. Mr. Brunskill?

A. Yes, sir.

Q. State your full name.

A. Richie I. Brunskill.

Q. Mr. Brunskill, what is your occupation or business?

A. I am District Manager with the General Tire & Rubber Company.

Q. Now, how does General Tire & Rubber Company conduct its merchandising in Memphis and Shelby County, Tennessee?

A. Through our distributor, Steepleton General Tire Company.

Q. They handle the whole business of General Tire Company here in Memphis?

A. With the exception of manufacturer sales and sales made to national accounts, yes, sir.

Q. Now, how long have you been in the tire business?

A. For ten years.

Q. Always in Memphis and Shelby County?

*Testimony of Richie I. Brunskill*

A. No, sir. I have been here since—from in 1958.  
665 Q. And where were you before that?

A. Prior to that I was at Houston, and was there for approximately six to seven years.

Q. Do you know, in addition to your own business, the way your competitors generally conduct their business in different areas, and particularly in this area?

A. I am familiar with it, yes, sir.

Q. You had better be familiar with it, hadn't you?

A. Yes, sir.

Q. Now, I want you to tell me what is the basis of the retail classification, and what is the basis of the wholesale classification in the tire industry in Memphis and Shelby County, Tennessee.

A. We classify a sale that is made to the ultimate consumer as a retail sale.

Anything that is a sale that is made and the purchase of the individual—for the purpose of resale, we classify as a wholesale sale.

Q. Do you know of any other classifications except that?

A. No, sir, I don't.

Q. In the tire industry, not only with your own company, but with competitors, have you ever heard of any?

A. No, sir.

666 Q. Now, I want to ask you generally about these so called national accounts.

Do you know how they are handled?

A. Yes, sir, they are handled by our factory.

Q. Just tell me how they are handled, just briefly, handled there.

A. Well, take a large firm like General Foods which do business there nation-wide. Their business with our company is handled at the home office in New York. The billing is handled, the price structure is handled, and we have no knowledge—I should say the dealers have no knowledge what that price arrangement is.

*Testimony of Richie I. Brunskill*

We in turn issue cards to these individuals of the company who have occasion in a company owned vehicle when they need tires. Their authorization given the distributor dealer. And upon seeing that they are national account and authorized, our dealer is authorized to deliver them the merchandise.

An appropriate national account form is written up, and issued by the company—we in turn issue credit for the purchase price that the merchandise costs, plus a small delivery charge.

And that goes to the national account billing.

667 It is a national account sale, not a dealer's sale.

Q. The dealer have anything to do with fixing the price?

A. No, sir.

Q. No contractual relationship whatever between the dealer and the customer?

A. No, handled by the home office.

Q. The dealer is not concerned with the credit of the customer in any way?

A. No, sir.

Q. No contract is ever made at any time between the customer and the dealer?

A. No.

Q. The whole contractual relationship is between the customer and the company, in your case General Tire Company?

A. That is correct.

Q. And it is the General Tire Company who is concerned with the credit of the customer?

A. That is correct.

\* \* \* \* \*

*Testimony of Richie I. Brunskill*

668

**Cross-Examination,**

By Mr. Tineher:

Q. Mr. Brunskill, since Mr. Burch has given some testimony here, to which you assented, in regard to the loan of tires by somebody to somebody else, let me get this clear.

Those loaned tires, they come in regard to these national account sales?

A. The merchandise is initially billed to the dealer. He owns it. It is his. We request the dealer to deliver merchandise to these national accounts, and upon verification of this delivery which is authorized by us,  
669 of course we issue a credit for what he paid for the merchandise, plus this service charge.

Q. Does the dealer get that tire back eventually that he has delivered to a General Tire Company customer?

A. Based on his turn-over, yes, sir, sure he does. He buys as he needs. And this is a function for the General Tire and Rubber Company.

Q. Perhaps you misunderstood my question.

Now, does Mr. Steepleton, to be specific, get back the tire you said he had loaned to some national account customer of General Tire & Rubber Company?

A. Well, he had not loaned them, let's say, to the customer. He has loaned them to General Tire & Rubber Company. This just is more or less a return of merchandise. Most of this merchandise they buy in accordance with the popular sizes, he is willing to carry in his inventory anyway.

Q. Yes. But he does not get back the same tire he has delivered to the customer?

A. The same size tire. No, couldn't give him back the same tire, be impossible.

Q. He does not necessarily get back the same tire, the same quality in inventory too.

*Testimony of Richie I. Brunskill*

670 Does he necessarily get back the same size, grade—?

A. National accounts all buy current merchandise. They get no concessions in the way of—let's say discontinued merchandise. And it is only natural, and I would say yes, he would get back the same size and type tire. He would—that is what he would have to.

Q. Then he gets back what he re-orders rather than what General Tire and Rubber Company determines was the type of merchandise that he delivered to the customer, is that right?

A. Well, let's say this. The majority of our national accounts would buy the 100 Level tire, which is a first run tire, the Jet Air, and if it was to someone—they were in a hurry, they probably loan it, probably looked—everybody will carry those in inventory. The size—I forget the size. And he would definitely re-order Jet-Airs. But he just is rendering service.

Q. Well, he would re-order when his stock reaches the level that he feels in the exercise of good business judgment he needs to order more of those tires, is that right?

A. Generally they order between twenty and twenty-five. That is correct. Most all the dealers usually do, the dealers who have been—

671 Q. What he re-ordered, though, in other words, is determined by how many tires he sold during the month rather than on the basis of how many may be delivered to some national account customer, is that correct?

A. That is true, according to his movement, that is right.

Q. And his judgment to what he needs to replenish his stock?

A. That is true. That is true.

Q. Do you in any way maintain a record at your dis-

*Testimony of Richie I. Brunskill*

trict office concerning the volume of purchases by Steepleton General Tire Company?

A. We get a monthly report, yes, sir.

Q. From Mr. Steepleton?

A. No, sir.

Q. From the company?

A. Yes.

Q. From the company?

A. Right.

Q. Does that monthly report show the amount in dollar volume of his purchases for the period covered by the report?

A. Yes, sir, it does.

Q. Does that monthly report also show the dollar  
672 volume in sales in the category of national account sales?

A. They are deducted from his volume, yes, sir.

Q. Are they shown in some other category?

A. Wholesaler's report, yes, sir.

I am not sure for those years—yes.

National account sales were deducted from his volume. They are not even credited to his purchases, because they are handled by General Tire and Rubber Company.

Q. But they are shown in this monthly report, are they not, by dollar volume?

A. They should be deducted from his volume, yes, because he did not purchase the merchandise, theoretically.

Q. I believe you are trying to answer, sir, but you are not answering the question, Mr. Brunskill.

Are those national account sales by dollar volume shown on the monthly report?

A. Not as such. If a national account customer, you see, was deducted, and adjustments.

Anyway, this involves really no resale.

We deduct adjustments and also deduct national ac-

*Testimony of Richie I. Brunskill*

count deliveries, and also deduct deliveries to municipalities and things of that nature. And they are in a lump form, and there is no way could designate and say, 673 "This is national account there," no.

Q. Then, there are adjustments such as faulty merchandise that had to be taken back for a price adjustment, and any merchandise for some reason or other is taken out of sales stock?

A. Returned merchandise, things of that nature, are found in that category.

Q. In your experience in dealing with Steepleton General Tire Company, have you found that each month their monthly report will show purchases by Steepleton General Tire Company in dollar volume which exceeds these national account sales and other transactions that you group into the category where you say you are giving him credit?

A. You mean will his purchases exceed the amount of what we would deduct?

Mr. Tincher: Yes.

A. They always would, yes, sir. They always would because that is—

Q. Suppose for some particular period, Mr. Brunskill, after the Steepleton Tire Company has purchased a large volume of merchandise in one month, and during the next month he drops with reference to his purchases, but 674 he makes large quantities of national account sales or deliveries, if that actually exceeds the amount of his purchases for the month, how would that be handled, the accounting procedure of General Tire Company?

A. Well, a situation like that would never exist because his purchases would always exceed the small amount of credit extended against his purchases, because they are so minor.



*Testimony of Richie I. Brunskill*

Now, verification can be obtained very easily by examining—producing our sales reports. But that has never existed, never a period where he came close to his volume of purchases, in other words.

Q. In other words, then, his deliveries of tires and tubes—both truck tires and passenger tires for national account customers will not exceed his own purchases of tires from the General Tire & Rubber Company?

A. Oh, no. That includes adjustments, returned merchandise, and everything, would never exceed—not any month.

Mr. Tinker: That is all.

Mr. Burch: Thank you.

(Witness excused.)

675 The Court: Suppose we have a little break, gentlemen, about ten minutes.

(Recess.)

Mr. Burch: I would like to recall Mr. Brunskill a moment, Your Honor.

**RICHIE I. BRUNSKILL,**

the said witness, upon resuming the stand, testified further as follows:

**Redirect Examination,**

By Mr. Burch:

Q. Mr. Brunskill, I asked you in detail while you were on the stand before about your retail operations such as Mr. Steepleton is one of your retail dealers, but I neglected to ask you about the wholesale aspects of the dealer.

Do you have wholesale dealers?

A. Yes, sir, we do.

Q. How many dealers in all classes are there in your territory, wholesale and retail?

*Testimony of Richie I. Brunskill*

676 A. Totally are approximately two hundred.

Q. About how many of those are wholesale dealers?

A. Eleven.

Q. Now, to be a wholesale dealer, what do you have to do?

A. We have a form, which is called a one hundred percent wholesale application, which they must execute in triplicate, then it is approved by the home office, whereby we can extend them this price concession.

Q. Now, under that arrangement do they agree not to sell to any person who is not a reseller?

A. That is correct, they—

Q. Now, in consideration of that, do you make them a further reduced price as compared to the price you give the retail dealer?

A. That is correct, tires, tubes, batteries and accessories.

Q. The person who agrees not to sell except to resellers, and thereby qualifies himself as a wholesaler, how much cheaper can he buy than, say, Mr. Steepleton who sells the product to me, in other words.

A. Oh, the battery costs from ten or fifteen percent. The tires and tubes, two to three percent, as far as billing price.

677 Q. So these wholesalers can actually purchase that much below Steepleton?

A. That is correct.

Q. And on a volume of nearly one million dollars the testimony shows he does, that additional discount is real money, isn't it?

A. Yes.

Q. Probably in the aggregate of forty or fifty thousand dollars a year, putting everything in, would it not?

A. Yes, sir.

Q. So he pays that much more because he is a retailer?

*Testimony of Richie I. Brunskill*

A. That is correct.

Q. Now, has size got anything to do with it?

By that I mean, are many of your wholesalers smaller operators than Steepleton?

A. We have some that purchase less than twenty-five thousand dollars a year, so they are very much smaller.

Mr. Burch: That is all.

**Recross-Examination,**

By Mr. Tincher:

Q. Mr. Brunskill, would any of those smaller wholesalers that you just mentioned be in the nature of jobbers?

A. Yes, sir.

Q. Another term is manufacturer's representative, I believe?

A. In most cases they are all jobbers of consequence, like Reynolds Brothers at Union City, Fancher Oil Company at Fayette, Alabama, people in that category, but who had dealers that they sell from purchases—resell it.

Q. In carrying on their business, do they maintain a stock of your merchandise?

A. Yes, sir, they do.

Q. Do they maintain a stock of your merchandise, the dealers you have classified as General Tire & Rubber Company's wholesale dealers within your district, do any of those have a recapping tire trade or plant in connection with their business?

A. Some do, some don't.

Q. If they do recapping, are they permitted to do consumer recapping?

A. They in most cases are not. Through their dealers, if they have any retail outlets, they have a separate set of books to handle those transactions.

*Testimony of Dr. Warren W. Leigh*

Q. And they can carry on both wholesale and retail  
business, but they have to maintain two separate  
679 accounting records, is that correct?

A. That is correct, according to the agreement  
which we have with them, which they execute in triplicate  
and is in our file, yes, sir.

Q. Is there a certain designation for that type dealer  
like 2 double E—1 double E?

A. We classify it W. H.

Q. You classify it W. H.?

A. Our distributors are on the basis of billing prices,  
one, two, three. Then these are wholesale and W. H.  
And we do not make these prices available to our dealers,  
only to the W. H. accounts.

Q. Now, the classifications of dealers in the group Mr.  
Steepleton and his company belong to, what are those  
three designations you mentioned?

A. It is according to volume of business. If a man  
buys less than twenty-five thousand dollars worth of tires,  
he is on basis number one price.

If he buys in excess of fifty thousand, number two.

Over and above fifty thousand, be number three.

Q. Then Steepleton Tire Company would belong to  
your large classification?

680 A. That is right.

. . . . .

681

**DR. WARREN W. LEIGH,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Mitchell:

Q. You are Dr. Warren W. Leigh?

A. That is right.

*Testimony of Dr. Warren W. Leigh*

Q. The spelling of your name is L-e-i-g-h?

A. Correct.

Q. The "Doctor" is a title which you obtained by qualifying to hold the degree of Ph.D., is that correct?

A. That is correct.

Q. Where did you take your graduate work after you got your Master's degree?

A. I took my undergraduate degree at the University of Utah, and M.B.A., the first graduate degree, at Northwestern University, and Ph.D. at Northwestern University.

Q. I think all of us are familiar, of course, with the phrase so far as Ph.D.

The first graduate degree, the M.B.A., is Master of Business Administration?

A. Business Administration.

Q. You received both graduate degrees at Northwestern?

682 A. That is right.

Q. Now, tell us when you obtained the last, the Ph.D.?

A. 1936.

Q. Will you tell us what was your thesis for such that is submitted for the Doctor's?

A. If I recall the exact title, it was on "Distribution Problems of the Tire Industry."

Q. Now, then, Dr. Leigh, during the time you were preparing your thesis in connection with the distribution or marketing or related activities in the tire industry, and from that time in '36 and before, right on down to date, have you entertained and continued to entertain an interest and taken an active participation in the tire industry?

A. Yes, it has continued. The activity has been you

*Testimony of Dr. Warren W. Leigh*

might say more or less because of my demands of my position interfering with it today, but I continue——

Q. Where is your home, Dr. Leigh?

A. Akron, Ohio.

Q. Akron, of course, is the rubber city of the United States. There are at least four of the larger tire manufacturers there and considerable other people and companies, in fact.

683 Q. Why is your position up there, or what is your occupation in Akron.

A. Presently I am Dean of the College of Business Administration at the University of Akron and professor in business administration.

Q. For what period of time have you held the rank of Dean of Business Administration?

A. Since founding of the college in 1953.

Q. Prior to that, were you on the faculty of the Marketing and Economics Department at the University of Akron?

A. Yes, sir, I was connected with the University of Akron in 1926, and been there except for the war years continuously.

Q. And before you obtained the rank of Dean of the Business Administration school, I think you indicated you were professor of Marketing?

A. And head of the Commerce Department.

Q. And you retain that title now, do you not, sir?

A. Not head of the department because that department has now been enlarged and made into the college with the dean capacity.

Q. I believe I am correct in thinking, Doctor, that you have written extensively for trade journals in connection with the business—in respect to the tire industry  
684 itself, and particularly tire retailers.

Will you tell me whether or not, sir, for a period

*Testimony of Dr. Warren W. Leigh*

of time about 1936 and for a few years thereabouts you were on the staff called—the staff of a publication out of Akron called Tire Review?

A. That is right.

Q. For about what time during and after 1936 did you find and submit articles as one of the editors of that journal?

A. Oh, I can only estimate that, sir. I think until—quite continuously I believe until about 1940—'41, and then I went to Washington, and have been submitting some articles since for the other journals.

Q. But you are placing that here with reference to the beginning of the World War II period when your normal Akron activities were at least interrupted?

A. Yes.

Q. In connection with your position as an editor of this Tire Review, is it true you travelled extensively through the section and you concerned yourself with problems of the individual tire dealers in many places, and this was substantial, and many of them, is that right?

A. Yes, sir, regarding the industry from the retail-  
685 ers' point of view in selling, pricing, retailing, et cetera.

Q. Now, then, you have indicated that your Akron activities were interrupted because of World War II.

Am I correct in thinking you held a position in respect to the rubber pricing and Rubber Pricing Unit with the Office of Price Administration during World War II?

A. Yes, I did.

Q. I have a run-down of that, and I believe it is correct, and I wish you would correct me if I am wrong—according to this you served in Washington in positions from 1941 through 1944 as a member of the Rubber Pricing Unit of OPA, I believe started as Deputy Rubber Director, then advanced to Supervisor of Tires and Tubes,

*Testimony of Dr. Warren W. Leigh*

which is in the Rubber Director's office. At one point you also held title as Secretary of the Navy Rubber Surveying Committee. Then you were put in the Trade Relations Section of the Rubber Prices Branch. And I believe at the conclusion of your service with the OPA you were head of the Tire Prices Section, all of which is in the rubber pricing field.

A. No, sir, may I correct that?

Mr. Mitchell: If you would, sir.

686 A. (Continuing) That is practically inversed.

Q. Oh, it is practically inversed?

A. Yes. That is true, as I recall the price control economist with the Rubber Prices Branch. Then ultimately I became head of the Rubber Pricing Section of the OPA. And then we got immersed in some industry problems. I was given the heading of the Trade Relations Activity Branch. Then I went over to the Rubber Director's office as Supervisor of Tires and Tubes, and then subsequently became an assistant to the Deputy Rubber Director, and that was the final position.

Q. Yes. Thank you for that correction. It appears I did take it in something of inverse order.

In connection with your service in several capacities with the OPA, you were, I am sure—you did, I am sure, become familiar with the various publications, bulletins, classifications and definitions used for Office of Price Administration purposes?

A. And put out some of them.

Q. Yes, sir. Now in the deposition of W. W. Marsh—whose name I am sure is familiar to you, of course—an exhibit in testimony now by deposition having been read,  
an exhibit as numbered specifically Exhibit D to  
687 Mr. Marsh's testimony—and I am reading from  
page 3 and I will go over a little bit onto page 4  
of that—and I want to know whether this dovetails and



*Testimony of Dr. Warren W. Leigh*

is in accord with your recollection of the manner and method of sales classifications by the Office of Price Administration.

"The OPA price schedules were also prepared with the advice and assistance of members of the industry, and hence provide valid evidence of what the industry recognized as retail sales.

"Price Schedule No. 63, relating to Retail Prices for New Rubber Tires and Tubes, issued by the Office of Price Administration on December 30, 1941, provided in part as follows:

" 'When used in this Schedule, the term . . . "Sale at Retail" means any sale to a purchaser for use by such purchaser and not for resale'."

A. Yes, sir.

Q. (Continuing) —of the OPA record?

"This definition or one similar to it, was continued through the history of OPA. Thus Revised Maximum Price Regulation 528, issued in 1945, the last 688 Regulation containing a definition of retail sales for the tire industry, provided:

" " "Retail Sale" means sale to a buyer for his own use and not for resale'."

"Similarly, OPA price regulations for wholesale sales recognized that in the tire industry all sales for use are treated as retail sales. Thus Maximum Price Regulation No. 143, relating to Wholesale Prices for New Rubber Tires and Tubes, issued by the Office of Price Administration of May 14, 1942, provided:

" " "Sale at wholesale" means any sale, other than a sale to a vehicle manufacturer for original equipment of such vehicle, except a sale at retail.

" " "Sale at retail" means any sale to a purchaser for use by such purchaser and not for resale.'

"Again, a similar definition was continued throughout the history of OPA——"

*Testimony of Dr. Warren W. Leigh*

And then there is a reference to the last regulation.

Now, then, I will ask you, as one with service in  
689 connection with rubber prices and practices of the  
OPA, does that meaning that I have just read to  
you comport with your own recollection and your understanding of what was, in fact, approved on the part of the OPA?

A. As far as I recall. I don't recall the dates of the last issuance, whether I was there or not at that time.

May I correct that also? In April, '44, I served—  
Mr. Mitchell: Sure.

A. (Continuing) Rather, through April, '44, if I recall the date.

Mr. Mitchell: Yes.

A. (Continuing) But as I recall the situation, we made no distinction except the basic one for resale as wholesale and for consumption or use was retail.

Q. In other words, we will have a two-part classification?

A. No breakdown.

Q. Sales for resales were wholesale, and the rest going to consumers or users are retail?

A. Yes.

Q. Now, the name Marsh is familiar to you, I am sure, Dr. Leigh, because, as a matter of fact, you all have been  
together at management conferences and various  
690 and sundry seminars and forums for the attendance  
and instruction of tire dealers who are members  
of this trade association, sir?

A. I have known Marsh a long time.

Q. Will you give us a fairly brief outline of those seminars, the kind of instruction—the kind of teaching that you have done through Mr. Marsh's association for its members particularly prior to doing work on whatever

*Testimony of Dr. Warren W. Leigh*

seminars may be held at Akron at your own university, and those you have attended and perhaps been on the staff of, I will say, at other places?

A. Prior to Mr. Marsh's activity in the National Association of Tire Dealers, I have gone out on regional conferences with him, then had quite extensive relations with Mr. Marsh in 1955, I believe it was, and at that time held regional conferences, and I had been out on some of the programs.

We instituted at the University of Akron a tire dealers' management program. And we had the assistance and cooperation of Mr. Marsh and his cohorts on that. In fact, he and I think one of the other men were on the program—one other man from there was on the program. But I am not sure about the second year or third, whether

that was the time the NTDRA began its particular effort and to plan a particular—and set up some management seminars of their own patterned after our program which we had pioneered there with the University of California, one at Georgia. We carried the program for five years. At the end of the fifth year, NTDRA were staging several—perhaps ten or twelve, maybe more, regional conferences where they bring in tire groups. Some of them I participated in and some I did not.

And due to these university programs at the University of Georgia, University of Southern California—not University of California, pardon me—well, our registration was falling off, we were getting no monetary support from the national association at all. We had to stand on our own feet. So we then discontinued while, as I understand the situation—I can't vouch for it—the National Association of Tire Dealers were sponsoring the other two programs.

Q. And in addition, Dr. Leigh, to these appearances or

*Testimony of Dr. Warren W. Leigh*

lecturing or teaching that you have done at these formal seminars, have you also appeared on many occasions at regional and national meetings held by Mr. Marsh's NTDRA as the speaker or in some capacity.

692 A. Yes, I have attended a considerable number of them. And shortly after that, they instituted what they called the advanced management seminars in 1956, I think was the year, or '57, and I believe I have appeared on every one of those programs.

Those were primarily for the dealers that the larger dealers or else dealers that would be at one of these college seminars here or all the others for an advanced seminar.

Q. You mentioned the advanced tire dealers—advanced program.

I have here a folder which you have given me which illustrates the management program which was held under the auspices of the University of Akron, at Akron, Ohio. This one apparently dealt with the 1959 session of your program.

Is that this advanced management program to which you just referred?

A. No, that is our college program. We call it tire dealers management program, which was similar to those where I have mentioned—the University of Georgia—

Southern California. But this advanced management dealer was strictly a national altogether—A  
693 NTDRA program.

Q. Yes. I would like you—

A. (Continuing) —For thirty or more other dealers that would appear at examination.

Q. I would like you, if you would, please, sir, make this an exhibit to your testimony, and that involves part of your program, as there appears?

A. Yes, sir.

*Testimony of Dr. Warren W. Leigh*

(Thereupon said document was accordingly marked as Defendant's Exhibit U, and same will be found among the exhibits hereto.)

Mr. Mitchell: Do you want——

Mr. Tineher: No objection.

(Document examined by counsel.)

Q. Now, then, Dr. Leigh, as is shown on the inside of the cover of this, there are sponsors shown, among them six of the tire manufacturers, tire and rubber companies,—correction, seven—and then the National Tire Dealers and Retreaders Association.

I see on page 3, it would be, that you—your name is in first rank of the educational advisory committee for this 1949 program. And I take it that you have the same status with regard to others held at Akron?

A. That is right.

Q. Now, in each of those management conferences, the advanced meetings for dealers, they were attended, I am sure, as the name implies, by tire dealers proper. These were men who manage tire stores for the manufacturers and who were themselves dealers. And they came in order to present their problems and in order to have you and others on the seminar program help them facilitate their efficiency in their business?

A. Yes, sir. More correctly, perhaps, or specifically, primarily what the trade would call independent dealers rather than company store managers, and so on.

Q. All right, sir. And in connection with the company store managers, have you had experience over the past many years in conducting surveys or making studies that dealt with retailing by the manufacturers in the tire business in Akron or elsewhere? Have you made surveys and other work, Dr. Leigh?

A. Yes.

Q. At their request?

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I believe to the extent your busy schedule permits,  
695 you also serve as marketing or management consultant, do you not, separately and apart from your teaching capacities. And I take it from that you are available as consultant, not only for the tire industry, but generally?

A. Yes, I have been, although my work has been primarily in the field of tires or else petroleum products. And I have served other concerns and made studies for them, such as Montgomery-Ward, duPont, and so on.

Q. Dr. Leigh, what about appearance perhaps before Congressional committees in connection with marketing studies, particularly with reference to the tire industry studies? Have you had experience presenting material to them on one or more occasions?

A. I have presented materials to them, yes, sir. I have not appeared before them.

Q. And are those materials what you would have abstracted from studies you have made and which you have already testified about?

A. Yes, sir.

Q. And these were submitted presumably at the request of somebody on the committee or somebody getting the material?

A. Sometimes a dual distribution concerning some of them.

696 Q. What about publications, Doctor? I know you were kind enough to submit to me quite a list, Doctor, of your extensive publications.

Is the fact accurate or not to say your writings for trade journals or for technical journals, as well as for more general media—the number of articles over the period of time you have been teaching runs now I guess well over a hundred specific general articles, and that the vast majority of these are on tires, deal with cases

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in the tire industry, and that the vast majority of those concern themselves with distribution for marketing purposes at this time?

A. Yes, I would say—something of a reasonable estimate, I would say, fifty perhaps articles dealing with the tire business.

Q. Now, then, Dr. Leigh, based upon your long participation in teaching or rubbing shoulders with the tire dealers, I would like to ask you, sir, what in your opinion is the classification of sales recognized in the tire retail industry as between wholesale, retail, whatever the classifications may be?

A. Well, primarily two classes—the wholesale,  
697 which are sales for resale, and consumer sales, which they call retail.

Q. Now, then, in respect to classifying a particular sale or transaction as a consumer or retail sale, does the price at which the sale is made, or the quantity sold, or the frequency with which a given purchaser may buy a certain size or type or tire, or the character of the purchaser—do any of these things—are any of these things given any account—that is, does it matter as long as the man that is buying the tires is a consumer, of the kind, type and frequency purchaser he is?

A. If I get the import of the question correctly, as long as he is a consumer he is a purchaser pretty generally and particularly at the retail, and the category and the number of tires—it would make a difference in the price, of course, because this industry has generally been characterized by quantity discounts, but he does not thereby get a wholesale price which is known as the structure of wholesale price.

Q. So, if he is a consumer, it continues to be in the industry recognition of retail sale?

A. As far as I know.

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698 Q. Now, has this been true, according to your observation and your experience, your—as you say, rubbing shoulders with tire dealers all the way back to 1936 when you earned your Ph. D. thesis in this particular area, and does it continue to be true today?

A. I would say of my personal knowledge that I could vouch for it being more true then than I could vouch for it today because I haven't been out in the field quite to the same extent in the past few years working with tire dealers to the same extent. But previously, as I recall, I travelled up and down the country visiting retail dealers. There comes to mind a case in Milwaukee, for instance, where we were interviewing, the question came up, among other things, of Government sale. And as I recall that they were thrown in there and to my knowledge generally as retail sales.

But the only distinctions seemingly were those that we have mentioned. And I know generally in my going throughout the industry, the classifications have made no distinction on so-called commercial unit sales. If they were for use, were thrown in as retail sales.

Q. In what effect—is it or not so, Doctor, you mentioned to me coming to court just now, coming in from  
699 the airport, that you are presently engaged in some collection of data and material on a project that you have underway at this time in which this process classification—that is a two-part classification?

A. I do.

Q. On one hand, sales for resales, being wholesale sales. On the other hand are sales to consumers, being retail sales.

This fundamental, and a current project of yours in this business?

Mr. Ray: If Your Honor please, this intelligent, well educated witness there does not need to have leading and suggestive questions asked to him.



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The Court: Objection sustained.

Mr. Ray: And Mr. Mitchell's questions to him are all carried on in that vein.

The Court: Objection sustained.

Q. Dr. Leigh, would you tell us to what extent the classifications there shown of this same sort are found in the textbook or academic approach to marketing and distribution problems?

That is, what are some of the recognized texts and what are the marketing theory—the academic approach—  
700 textbook approach, as opposed to what we have been talking about just now, which is recognition and practice in the tire retailing industry?

A. I take it that you are trying to draw a distinction here between wholesale and retail.

Mr. Mitchell: Precisely.

A. More theoretical.

Mr. Mitchell: Yes.

A. (Continuing) As contrasted in this industry.

Q. Up to now, then, my last few questions have been what is the practice in the tire retail industry. Now, if you will, I would like to talk to you on classifications—distinctions as they are described in textbooks and by marketing theories.

A. In speaking of wholesale, I have written a bit of it myself, not too much, although there was one article—oh, there back in 1936 or '37 or so in the industry.

But generally speaking, the distinction between wholesaling and retailing have not had the close consideration that they deserve.

There are two groups of authors. I think you can discriminate in that and name Beekman, Ingle and  
701 Buzzell. And another gentleman who has been interested in some distinctions there, Rowe Alderson.

Q. May I have the last name?

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A. R-o-w-e A-l-d-e-r-s-o-n.

Q. Who is—?

A. (Continuing) Perhaps I should say F. E. Clark, perhaps, and other writers in the earlier stages, which I think have done some pretty good writing.

I would like to start with Clark, if I might. There was a third distinction. As I recall, he entered three classes of marketing, which he called assemblization, outlet and dispersion. Then he tried to show how certain functions, deliveries, say, of its operation, are in the wholesale function, presumably was called assemblization. Also one handling goods in bulk, also procuring in bulk and moving on to either industrial consumers, which was in keeping with the historical understanding and general practices, as it were, and selling at volume prices, and so forth.

Now, Beckman and Ingle and Buzzell perhaps have carried the subject through more carefully than any authors I know of. And they attempt to distinguish between wholesale and retail. Most authors seemingly just  
702 accept or lump in as retail small sales, consumer sales—that is, household consumer sales and all of those. On the other hand, resales—sales for resale, wholesale sales, and throw in and lump all sales to industry or so-called commercial sales or to institutional commercial establishments for use by those establishments, so-called business use, as wholesale sales without being—going beyond that. And they just throw that, so it is all gone.

The Census has been a more discriminating—what it has come to—I think it has followed more or less the theories of Beckman or Ingle's. I think Beckman and Ingle's the Census theory, since perhaps both were engaged in it, as I recall.

But it seems to me that I would go on the resale—of goods sold for resale purposes would be, of course, wholesale sale.

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On the other hand, if some consumer sales, no question about it.

There might be some question—well, put it the other way.

I would not go on all—necessarily on all of commercial or institutional sales being—just because of that fact being wholesale.

703 Mr. Mitchell: Yes.

A. (Continuing) I would go a bit, rather, further, look to the nature of the wholesaling, because I think that it is a thought that is an adjustment, it is differential gear activity, and adjustment of volumes, adjustments to markets, and so on, so forth.

So, if there were small—particularly sales to commercial accounts, and in the general course of business I would draw the distinction particularly.

I don't think the machinery is set up to draw that distinction.

Q. Yes, sir. In the course of that discussion of the varying theories, the men that are exponents of the various approaches to the problem then from the theoretical, academic standpoint, you indicated that Dr. Beckman was closely connected with the census studies. Did you get the full benefit of the Standard Industrial Manual, sir? Or what those bulletins say, or what may be used by Government agencies in connection with census studies and such things, and such?

A. The S. I. C., or Standard Industrial Classifications, have used pretty generally as the theoretical definitions have changed as practices and conditions have  
704 changed, kept up to date and used the market of the Bureau of Census, labor or helpwise.

Q. And I think you indicated this Dr. Beckman, who was one of the proponents of the line of the marketing

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referred to is closely identified on census studies within the industry?

A. He served as consultant to the Census a long time. Dr. Ingle was at that time also engaged in it. It seems to me he was chief of the wholesale end. I wouldn't swear to it. But one in connection with the Commerce Department and one of the assistants in the Department of Commerce—that I think the assistant director of the Bureau of Domestic Commerce, it seems to me, or assistant director, it might have been, of the Census Bureau.

Q. I take it from what you have said about Dr. Beckman's close connection and perhaps authority in such matters, would it be a fact, Dr. Leigh, that the Industrial Classification Manual and some of the other data and approaches would be implementing his ideas and would further his general theories?

A. Well, they have some substitutions there and in the original—when the Census of Distribution was being  
705 formulated, and Beckman and Ingle were the two longtime—and some other gentlemen that were in the marketing field. Now, who got or from where I can't say.

Mr. Mitchell: Yes, sir.

A. (Continuing) But as Beckman and Ingle have been recognized as authorities in that field, I suspect the interaction is apparent. But just what—whether they were the generators of the criteria or advisability, I know not. But they had a hand in the early formulation.

Q. Now, Dr. Leigh, from your knowledge of the tire retailing industry, is it susceptible to being put into these nice little even categories that you have described as being sort of even, at least, portrayed by the marketing theorists such as Beckman and the other men, Doctor, and use such things as price quantity discounts or some other price criteria that these gentlemen are responsible for?

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A. Well, yes, we are alternately, as we work, more accurate and carefully—I suppose those things will develop, but the numerous tests there you would consider in connection with wholesale quantity price aspect and set up the business, the selling procedure, to whom they sell and advertise.

706 All of those would be factors and should be given consideration.

But the practice of the trade in most areas would make buying conceptual framework or you would expect to consider—now, it could apply—; I doubt that you could apply this conceptual framework in its entirety to any phase of the business, because of this gray area, and also it would be unrealistic perhaps to make the distinction.

But I might give one example, even though I have not conceded and admitted theoretically that all sales for business purposes were wholesale sales. One in a hardware store would have to distinguish the fellow that bought a hammer in every case, bought the same hammer, was he using it for household purposes or was he going to nail up his neighbor's fence, or something else? And like a fellow who might buy a tire that is for use on his car, or a salesman—if so, that would be a wholesale sale to you, and to me, if I were using it just for general purposes, it would be a retail sale.

And if one could carry it to the absurd length, in other words,—prohibitive from the consumer's standpoint.

707 But the broad standpoint, I think as time goes on certainly if we can differentiate these things more clearly, competitive factors will compel us perhaps to cut the line more clearly, probably, that the theorists have distinguished sharply enough and sufficiently clear classifications and groups where those demarcations can be made.

Q. Now, then, Dr. Leigh, I want to hand you a bulletin

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that has come in and is marked as Exhibit 6 to the testimony of Micklish in this case, and I direct your attention to page 33, and perhaps some more on page 34 of that bulletin, and I want to ask you in connection with this—this just being an interpretative bulletin put out by the Department of Labor,—it has on it on the cover its title—Title 29, Part 779, Retail and Service Establishment and Related Exemptions, and it has there near the very—or at the very bottom of the last page—it is January, 1960, issue.

Now, then, Dr. Leigh, if you would, please, sir, turn to page 33 of that bulletin, and I would like to run down these classifications which are in this paragraph (b), which is at the lower part of the lefthand column on page 33. And my purpose in going through these with

you at this time will be to ask you to analyze each one of these subparagraphs numbers (1) through (6), and tell us, if you can, first whether or not the substance of the classification presented in each of these paragraphs is, first, recognized and practiced in the tire retailing industry, and second, where it comes from—that is, what is its source, if you know, whether it is a matter of marketing theory or academic approach to the problems, and whether the material was by the Standard Industrial Classification Manual, and whether maybe some other source with which you are familiar.

Do you understand what—?

A. I believe so.

Q. All right. And under paragraph (b), which is in the lower part of this left column, it says that: "All sales of tires, tubes, accessories and tire repair services, including retreading and recapping, are recognized as retail in the industry, except those set out in subparagraphs (1) to (6) of this paragraph."

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And then subparagraph (1) has to do with sales for resale.

Now, this we have no controversy about in this case. This is wholesale business according to the contentions of both parties.

709 Subparagraph (2), right at the bottom of this left column, concerns sales made pursuant to a formal invitation to bid.

And my first question is: Is that recognized as retail business when done by a tire retailer or dealer?

A. To my knowledge, it is not recognized as a wholesale sale. It would be retail sale, as far as I know.

Q. How does it, as a practical—

A. (Continuing) I don't think it is, because it is currently—

Q. That is my next question. How, as a practical matter, are sales regularly made in the tire industry to governmental units? Who participates in that, and how are they—?

A. Well, all the military business is in the hands of the manufacturer, or practically all of it except retreading, and that is handled directly. The dealer has nothing to do with it, generally.

The state business as far as I know is handled pretty much through the central offices of the tire companies as well. The subordinate divisions of the state, school districts, et cetera, generally, as far as I have seen, are  
710 handled in one or two ways, either that the company has their agent to handle—that is, the company—they get the agent; he is handling it, is paid so much on delivery and service. On the other hand, if he sells it, he sells it, and as far as I know it is treated as retail sales.

Q. Now, do the sales to governmental units pursuant to formal invitation to bid—do they have any particular

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classification or any particular significance under this marketing theory that may have been developed by Beckman, Ingle and others, or as you understand it?

A. Normally and generally, let's say as a general classification, I would think yes, you would call those wholesale sales.

Q. According to the theory or academic contention?

A. That is right.

Q. Now, then, paragraph (3), which starts in the upper part of the righthand column on page 33, concerns sales to national accounts in which delivery is made by a local tire company under a centralized pricing arrangement between the customer's national office and the tire manufacturer; payment—according to this manual and set of regulations—payment may be made  
711 either to the local dealer or direct to the tire manufacturer.

Our concern in this case, Dr. Leigh, is where the payment is made direct to the central office. The billing and what-not in this, the proof is, is done direct to the central office of the tire manufacturer which this defendant represents.

In connection with that kind of transaction, would you tell us what your understanding of it may be, according to the industry's own recognition?

A. Let me be sure I have your question correctly.

Mr. Mitchell: Yes, sir.

A. (Continuing) Presumably bought the tires as such and they are delivered by the dealer?

Mr. Mitchell: That is correct.

A. (Continuing) Now, then, what is the thrust of the question, please?

Q. The question is: How, according to your knowledge, is that kind of delivery transaction considered in the



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tire retailing industry? By "considered" I mean classified.

A. There is no distinction there. It is a commission-type arrangement or else a service charge. And as far as

I know and as far as I have seen, the accounts that  
712 are flowing to me, and we see several of them  
periodically, there is no separate set-up for this,  
just taking them in as part of these sales—

Mr. Mitchell: Yes.

A. (Continuing) Are retail sales to me.

Q. And the classification, then, is retail sales?

A. The classification, then, is retail sales.

Q. How, if there is a particular definition or classification for these national account transactions—well, first, I should ask this:

From your knowledge of other industries and your marketing studies of other industries, is this national account kind of transaction known outside the tire business?

A. Oh, sure.

Q. Generally?

A. Sure.

Q. Then perhaps it does have some significance in marketing textbooks or the Industrial Classification Manual.

Could you tell us specifically and briefly?

A. Generally, you would consider it wholesale sales. But even—and I recall one of the Federal Trade Commission cases where discriminatory prices were involved, as I recall, but the question there whether they were through  
particular organizations making deliveries at one of  
713 the stores in such small quantities, whether it became a wholesale or retail sale, as it were.

But generally speaking, they would be wholesale sales.

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Q. This is the Industrial Classification Manual, according to the marketing theory?

A. Yes. Getting back, if I may, to the point I tried to make earlier, normally as wholesale business I suspect you would originally get some ingrossing of large quantity.

It was at this level the manufacturers—and also for resale in larger quantities and handling in bulk, and the bulk had to be broken down, maybe carload lots are dealt out for resale, and it was the quantity—the quality and quantity adjusted for the wholesale agents of one type or other to the manufacturer—to the small manufacturers or the processors, or that type.

But it was largely a different type of transaction, not strictly markets of that nature, not characterized by the type of sale that you would make to the individual consumer for household purposes, or your household consumer, and so forth.

So there were these functions. There were various ones—some six or eight of them that we could mention involved. The movement or procuring in bulk, the  
714 financing function, information function, and so on and so forth.

In the more sensitive market, particularly, of where one would think that they would be characterized as wholesale sales.

And so very frequently big industries will buy them nationally for pricing advantage.

Q. One question in that regard, Dr. Leigh. In the tire industry, has the manufacturer taken over this wholesale function, this business of servicing particular big accounts, and that sort of thing?

A. Yes. That is one of the real complaints in the industry on behalf of the dealers, that the manufacturer has done more and more of this business, and as a result.

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more of it is handled by the dealer on a service charge or percentage, or on those bases.

Q. Moving on down to number (4), Dr. Leigh, which has to do with sales to fleet accounts at wholesale prices, and then it goes on and defines a fleet account to be a customer operating five or more automobiles or trucks for business purposes—it says, “Wholesale prices for tires tubes, and accessories are prices equivalent to, or  
715 less than, those typically charged on sales for resale.”

Now, first, is this connotation recognized in the industry on a fleet account that purchases at something less than resale are equivalent to wholesale prices—in other words, does that fit the tire business as you know it?

A. Well, may I raise a question here, please, to be certain that I understand? Actually, sales to fleet accounts, there are no definite recognition of a fleet account.

Q. Dr. Leigh, let's see perhaps if we can simplify this thing in terms of this number (4).

First, the fleet accounts at wholesale prices, without going into what the distinctions and so forth may be, are sales to so-called fleet accounts by tire dealers considered by tire dealers or authorities in the tire industry to be retail business or wholesale business?

A. Retail business. That is the thing I wanted to clarify. That is, the fleet accounts or wholesale prices do not necessarily match up at all.

Mr. Mitchell: Yes.

A. (Continuing) That is one thing. The price structure or situation is so confusing that simply price  
716 does not mean a fleet account definition——

Q. Without going into too great detail, the section is in two parts brought into paragraph (4), how to classify sales, and the section goes into whether or not they

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are made at below some prevailing price, or whether that is customary.

Has it been your experience and your knowledge of the tire industry that there is a prevailing price that is consistently true in the tire business for any kind of customer?

A. They have been most chaotic for quite a long period of time. There is no—as a matter of fact, there is no tire market as such. There are a series of tire markets, up and down, and the prices vary at times in those markets. But particularly, with these new types of retailers coming in, and that—well, let's say the general-ity of the use of tires and somewhat standard—I am using "quality", I am using the term loosely—make them susceptible to sale by somewhat new type of outlet. They are sold by drug stores, hardware stores, now discount houses and everything else. And that competition will vary. The cost basis to the retailers makes for a  
717 situation that they—and other things—there is just no definite and divided price structure at all. So that the price just does not signify anything in and of itself.

Q. Now, then, the paragraph (5) has to do with sales of a tire rental service on mileage contracts.

First, from your knowledge of the industry, do retailers regularly or only very infrequently engage in such mileage contracts?

A. As far as I know, that is, while the business is increasing somewhat, that is, by retailers or smaller accounts, the mileage business is pretty much like the tire phase—pretty much—the national tire business that has been concentrated pretty much in the hands of the manufacturer over a good number of years, because those tires had to be serviced very carefully to pay out.

Q. To the extent it may be done, however limited, by

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a retailer, according to the industry's recognition and practice, if done by a retailer it would be classified whole-sale or retail?

A. As far as I know, sir, they are classified as retail. I have to see, you know, the dealer set-up and the whole dealer's actual set-up, whether or not they are such.

Q. Item (6) is "Sales of servicing and repair work  
718 performed under a fleet maintenance arrangement on tires for trucks and other automotive vehicles whereby the establishment undertakes to maintain the tires or tubes for a fleet account at a price below the prevailing retail price."

Actually, from what you have already testified, that this term "at prevailing retail price" is of course a mis-nomer and does not have application.

But, if done, is a sale or servicing repair work, if done by a retailer, how would—according to the industry's recognition, be classified as wholesale or retail business?

A. Well, retail.

Mr. Mitchell: I believe that is all.

The Court: Will this be a rather extensive cross-examination?

Mr. Ray: I think we can finish with him in thirty minutes.

The Court: All right.

Mr. Ray: I realize the potential, if Your Honor please, and have intended to be brief about it.

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**Cross-Examination,**

By Mr. Ray:

Q. Dr. Leigh, my cross-examination will necessarily be short because I don't know a whole lot about this particular subject, and for the most part it will be an effort to clarify what you have said here and what you have said in the past on this particular subject.

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First, I want to hand you, if I may, an excerpt—

Mr. Burch: May I see it, Counsellor?

Q. (Continuing) —from the October 19—I will have him identify it first—let him look at it—October, 1952, issue of the Journal of Marketing published by the American Marketing Association, containing an article entitled “The Quantity Limit Rule and the Rubber Tire Industry,” by you.

Do you have a recollection of having written an article about that subject? And if so, does that excerpt appear in that particular article?

A. I wrote an article on that subject. I assume, sir, that this came from that article.

Q. Well, will you look at it and see, if not in your recollection, but your recognition prevails as to what is contained in that particular excerpt, and if so, would  
720 you read the part representing what that is?

Will you please read it?

A. Yes.

Q. Well, tell us what it is.

A. (Reading) “Wholesale. The larger the sales volume of a dealer, the larger is the wholesale portion of his business. A dealer in the volume brackets about \$100,000 normally sells 20 to 50 percent of his volume at wholesale.

“Commercial——”

Do you want the other?

Mr. Ray: Yes.

A. (Reading) “Commercial sales refer to sales to trucking companies and national accounts. Large dealers to a great extent depend on commercial business for their volume. In urban centers particularly, these dealers concentrate almost entirely on sales to other dealers or to truck accounts and are playing a lesser and lesser part in the over-the-counter sales of passenger tires.

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Retail. "Regular retail embraces sales to individual consumers who usually own one or two vehicles."

And there is a reference——

721 Q. So we might be able to see in there, do you—  
or may I have it, Doctor?

That was written in July, 1952. Is that still valid, Dr. Leigh?

A. Now, are we talking about the distinction here on a theoretical basis, or are you talking about industry practice?

Q. Is there a difference?

A. There is. Are we talking about what is—which is what the article says there? In other words, is it valid for whatever economic purposes, or purposes of industry, now, is it valid?

From the theoretical standpoint, wholesale business—now, let's be sure of what we are saying.

Let me recast, if I may. May I, so we can make myself clear?

Q. Well, yes. Let me say I am going to show you some other writings of yours, and it might save some time if I show you, and let's deal with it in its entirety.

A. Yes, sir.

Q. In the book which you have written, on the subject "Marketing Channels for Manufactured Products,"—you recollect having some writings on this particular——

722 A. That is the Clewett volume?

Mr. Ray: Yes, sir.

A. Yes, sir.

Q. I call your attention particularly to page 122 of that book, which was written, I believe, in 1954, was it not?

A. I believe that is the date, the printing date or copyright date in '54, yes, sir.

Q. You look on page 122 where this particular language is contained, and I will read it so you can follow it.

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"The largest volume of sales is made to replace the worn out tires on cars and trucks. This constitutes the renewal or replacement market, which is really a dual market. The largest segment of replacement buyers are individual owners of automobiles and operators of from one to five trucks. These purchasers buy tires as their vehicles need them. Owners of from 5 to 1000 trucks constitute the so-called commercial market. These purchasers buy several to hundreds of tires at a time, and tire costs are a definite item to them. Not only the volume purchased but the discounts allowed and the services required set this group apart from over-the-counter buyers."

723 That is contained in your book?

A. Yes, sir.

Q. And that you participated in writing in 1954?

A. That is right.

Q. Which was published in '54?

A. Yes, sir.

Q. I want to ask a question on that before we go——

The Court: Suppose you put these papers in evidence as you go along, for the Court's benefit, if nothing else, here.

Mr. Ray: Yes, just asked him to identify it.

The Court: Yes, just the part that has been read—have been identified, both of them that have been read as of this time.

Mr. Ray: Well, Plaintiff's Exhibit 13. Let's make them cumulative.

Mr. Mitchell: Cumulative Exhibit 13.

(Thereupon said documents were accordingly marked as Plaintiff's Cumulative Exhibit 13, and same will be found among the exhibits in the cause.)

Q. Now, Dr. Leigh, I ask you to have the book in your



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724 hand and turn to the bottom of page 131 that is marked in the book there, in that particular part of the book and the subject or chapter which you wrote here was "Automotive Tires." I believe that is the title of the chapter—

A. That is right.

Q. (Continuing) —in which this is contained.

A. Yes, sir.

Q. And you point out in that that "Gasoline service stations, part and accessory dealers, motor vehicle dealers, automotive repair shops, farm equipment dealers, department stores, chain stores and mail order houses have all gone into the retail tire distribution business, and that as a result of this, the tire dealer has gone heavily into selling to commercial accounts and to all these types of retail dealers."

That is the quotation I just gave you. Then you conclude in there, in that general area there that:

"Thus he is no longer primarily in the retail business. But, he is still being referred to as a retail dealer."

Now, this would be a specific quotation. I am coming to primarily the part I am particularly interested in, the part there, starting at the bottom of page 131:

725 "The character of tire dealers has altered as they adapted themselves to the new competition and to changing market demands. These dealers have become primarily semi-wholesalers, truck tire sellers, and recappers instead of passenger tire retailers. The dispersion of the tire market plus the fact that a little retailer or gasoline station needs to carry only five passenger tire sizes to top 87 percent of the passenger car market has encouraged the multiplication of tire outlets. Tire manufacturers have encouraged tire dealers by their discount programs, to carry tire stocks and sell and supply these small sub-dealers. On the

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other hand, the drift of passenger tire purchasing from downtown stores to outlying convenient locations has caused the large, more centrally located dealers to concentrate on the large-volume commercial account business, recapping and other tire services.”

Now, as far as I know, those are the only excerpts from your book that seem to be particularly pertinent here, or at least, those were the excerpts you read.

And I think probably the short one—in fact, we will put this paper, of course in the record. I wish  
726 also to make it Exhibit 13.

(Thereupon said document was accordingly marked as a part of Plaintiff’s Cumulative Exhibit 13, and same will be found among the exhibits in the cause.)

Q. As quoted, your writings recognize a category of sales you term “commercial sales,” is that correct?

A. Yes, sir.

Q. You have also been careful, I have noted, in bringing attention to your previous testimony, to draw the inference as to industry recognition, practice in the industry.

I might point out to you—and I think counsel may agree with my interpretation, or may not—but that Congressional Record refers to that recognition in the industry as not being recognition by the industry—is what the industry itself says.

But with that statement, and since you have indicated you are dealing with either black or white—that is, wholesale or retail—I now ask you if there is there recognized at least a gray area between what is wholesale and retail, whether it may properly be termed non-retail?

A. I would not classify it as non-retail, because by  
727 that approach it seems to me they are non-wholesale.

Because one of the definitions of that—I dislike to use that term, it is non-descriptive——

Q. Let me——

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A. (Continuing) There is a gray area there, that is correct, but it is for the Congress to classify or characterize such.

Q. Let me put it this way to you, if I may.

A. Yes, sir.

Q. If I buy some large tires through you on a volume business in excess of nine hundred thousand dollars, one hundred tires for a large piece of equipment that I operate, and Mr. Mitchell, counsel for the defendant here, buys four tires for his dilapidated '54 Ford—

Mr. Mitchell: Let me state here it is a '53 Chevrolet.

Q. (Continuing) I get a substantially reduced price for the one hundred units that I buy from what he does, from the so-called list price or retail price.

Is his transaction in which he goes in and buys a tire from the dealer—is this a retail transaction?

A. I can't answer you on that basis, sir, for this reason—

728 Q. I haven't gotten into the one hundred units yet.

I am talking about he buys four tires for his own—tires at list price for his own tires?

A. He is most foolish if he does. He should go to the next store and see what he can get there.

Q. Don't mean he doesn't haggle with them. But that is a type of retail transaction, is it not?

A. Yes. And on the other hand, while here several years ago perhaps on a thousand units, and with that account will be a true transaction—rather, may be a commercial account, today I think it is becoming relatively rare, that they are keeping down inventory and pulling out groups, then pick up, one, two, three, four. And as a matter of fact, the great, great bulk of the true transactions are in the small accounts, because they are small buyers.

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But even the big buyers are keeping their inventory down to such an extent that they are not buying in one hundred units very, very frequently any more, as I sense the situation.

Q. Well, it is plain there is a differential between volume purchases at a lower price and in the ordinary purchase that I refer to that Mr. Mitchell has, for that  
729 matter, is there not?

A. One would expect it, and there should be, yes, sir.

The wholesale would expect it. There is that volume type of situation. You would expect it.

And my point was—the point there that in this industry the price is not the characteristic that you saw, whether or not you are, say, at five tens, or six tens, or nine tens,—is common because of volume business, whatever it is, and what the market is.

Q. And your practical experience is, as you have written, from some of the excerpts I have read there, there is a clear recognition of the discount for volume in the tire industry, is there not?

A. There has always been. And even in the gasoline service station and in that way that that is done, yes, sir.

Mr. Ray: Yes, sir.

A. (Continuing) And that is a very small volume.

Q. And the quantity purchased—it would just be un-businesslike for a dealer not to try to sell quantity purchases at lower prices, would it not?

A. He surely can do it, yes, sir.

Q. And the tire industry is no exception to trying  
730 to do business as one wants to from that standpoint, at least, on your tire dealers,—don't mean the tire industry—tire dealers?

A. The only thing I would say in that connection, I

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believe that the tire industry has emphasized the quantity factor, number of units purchased, or the dollar volume purchased, more than has the industry in general. This industry would have used wholesale classification or retail classification, it has been my experience generally, more than has the tire industry.

Q. Now, in your testimony that, as I understand the situation, the statement—and I believe it is also in effect what is in the book there—that not all commercial sales are wholesale?

A. I made that statement of my own initiative, yes.

Q. Does that infer that there are situations under which a commercial sale for business purposes would not be regarded as retail? In other words, making it easy for you to answer, I will say that you are going to have to draw a distinction between commercial, are you not?

A. Now, I am speaking theoretically again, not necessarily the practice in the industry. Yes, my own thinking, some of those sales in very small quantities would—they are more characterized by the retail than by the wholesale.

731 Q. Yes. But the question was phrased just the other way, Dr. Leigh. What type of sales are non-retail, or at least, do not fit into the retail category where they are sold—where they are commercial sales for business purposes you have indicated—?

A. Well,—

Q. —That one of the situations where you could not characterize this as a retail sale?

A. Yes, I would—

Q. Was the theory—?

A. I would generally state theoretically any sales to a substantial, large truck company should be classified theoretically as wholesale sales, if I am answering the question intelligently.

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Q. Well, now, that is part of it. Is there any line that you would draw, if you had to draw a line, as to the substantial, large trucking accounts? Can you tell us whether it is five or ten?

A. In competitive programs I believe, for general purposes, perhaps, owning ten trucks and above, or five trucks and above. The five, as being discussed some in the industry—I don't know whether we have that. I don't think there is any set decision on it. I know the dealers have been attempting to get some definition there  
732 that the manufacturers there would not step in and sell in the category of truckers below certain sizes, and so forth.

But certainly, I think that you could not call wholesale much below five vehicles, certainly on a theoretical basis, I would think.

Q. Now, let's get away from theoretical to practical.

A tire dealer has to separate his sales into retail sales and into fleet account sales and other categories.

Is it or is it not a practical approach for him to have a definite dividing line between what is considered to be a fleet or commercial account and what would be considered to be strictly a retail transaction?

In other words, is there some technical limitation—limit of the number of vehicles the test which as a practical matter would be useful to a tire dealer if he is faced with the alternative?

A. Well, I would think if I were a tire dealer, I certainly, if I were, would want to look at some such classification. But generally, from what I have seen, they do not do so adequately at all, because I think the cost differentials and the price differentials might be worthy of classifying so one could see what they were—whether

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733 this businessman adequately interprets, or whether  
the other one did. But generally, the tire dealers  
haven't done so. That is my own—

Mr. Ray: I believe that is all at this time, if Your Honor  
please.

Thank you.

**Redirect Examination,**

By Mr. Mitchell:

Q. Dr. Leigh, on cross-examination you were asked  
about certain writings that you have that used the term  
“commercial account” or “commercial market”, and you  
were asked as to—what those references are and how it  
was used.

My first question is, when you were writing articles for  
the journals that have been cited here and for textbooks  
for which you interpreted, were you writing as one—one  
considered an instructor or professor in marketing, the  
head of a department, the Dean of the graduate school,  
or were you writing as a member of the tire retailing  
business?

A. I wasn't certainly telling, in those journals or in those  
chapters, the retailers what they should do, but rather,  
of course, trying to draw some distinctions from  
734 the theoretical standpoint what good—the applica-  
tion of good theory to the situation would determine,  
and, of course, using classifications that I felt were ade-  
quate and sound under the circumstances.

Q. Yes, sir. But they express the theoretical or market  
research character, the marketing teacher's attitudes and  
classifications, do they not?

A. Yes. But in the long run, they might be good prac-  
tice, too. I would say that. But not necessarily would be.  
I felt that it was sound or I would not put it out, of course.

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Q. Every teacher would like to see his theory given practice, and I know you are a good teacher and no exception.

Now, Dr. Leigh, in the practices and recognition by the tire dealers and in the tire industry, in that particular industry how is this so-called commercial transaction or commercial sale treated, as a wholesale sale or treated as a retail sale?

A. It is treated as a retail sale. That I know in my work that I have done recently I had an awful time  
735 getting any information—certain information on wholesale sales where we were trying to split that which was for wholesale purposes or resale purposes—strictly at regular—I am just trying to make a distinction here—really, over-the-counter or through the regular so-called dealer channels. And I have had an awful time getting that information because it is—which the industry does not draw adequately.

Q. All right. In the tire retail industry the recognition is simply between wholesale business, which is for resale, and/or consumer sales, which are retail; is that correct?

A. Well, that is pretty generally so, yes, sir. That is so.

Q. Now, you indicated the consumer in the tire industry—tire retail industry—does practice and employ this idea of discounts for quantity purchases, as is typically true, I am sure, in all business.

My question is: Does the fact that the tire or product which the tire dealer may have sold at a discount in quantity alter the fact it is a retail sale if it goes to the consumer?

736 A. Not as far as our practice of accounting and discussion, sir.

Mr. Mitchell: Yes, sir. And that is the whole point of my question. I am trying to develop what you know of



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to be the recognition in the tire industry—tire retailing industry.

Thank you, Doctor.

**Recross-Examination,**

By Mr. Ray:

Q. One further question, if I may.

When you referred to consumers, are you talking about the ultimate consumer? Is that the man who uses it—your definition of “consumer”, or are you using “consumer” in the broader sense?

A. Again, when I am talking theory—when I am talking marketing theory normally we think of the consumer as the ultimate consumer, the so-called household consumer. You and I are of course under the general category in that situation.

And now I am generalizing again.

Commercial sale there would be—industrial sale, or industrial or commercial sale would be lumped into  
737 wholesale, generally speaking.

So, ultimate consumer sale is generally retail, theoretically, and the other is more wholesale.

Q. Now, I neglected to read one of the footnotes in this item I read from page 132 of your book.

You don't have a copy, Doctor, but I will read it. It might help a little.

Footnote 59, on page 132 of the Marketing—book Marketing Channels—

A. Yes.

Q. “National Association of Tire Dealers surveys show that as tire dealers become larger their proportion of wholesale and commercial volume grows larger.”

A. That is I would say generally true. That has been my experience.

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Q. Now, in order to clear up, I believe, an ambiguous, I believe, impression counsel has left that anything except just wholesale are retail, as far as the classification of business in sales is concerned, is all there is.

Can you tell us now whether there is a clear and well recognized area of business sales among tire dealers that is referred to generally and generically as commercial accounts or commercial sales?

738 A. Well, they would talk about commercial——

Q. I am not talking about theory now. I am now talking from a practical—you said it was theoretical.

A. Yes, they would talk about commercial sales and commercial accounts, but——

Q. And they also talk about retail sales?

Mr. Burch: I am sorry to interrupt. He said "but——"

Q. Beg your pardon. You finished, didn't you?

A. They would talk about commercial accounts. They would talk for advantages for their trucking accounts or fleet accounts, and so forth, call them commercial sales, terms that have been used in the industry, but no segregation of those sales, and in the same breath treat them as retail.

Q. And, sir——

A. (Continuing) That is no——

Q. Do sales tax statutes have any bearing on the fact that they found it not necessary to segregate and did not actually segregate on their records, perhaps in some instances, commercial sales from other type sales?

A. I believe that would pre-date——

Q. In other words, it is fair to say——

739 A. (Continuing) They just——

Q. Further, that the people in the United States Department of Labor or elsewhere in the Government itself may have used some terminology bases of retail or

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wholesale, or are just simply pulling something out of the air? At least, there is one recognized area of classifications of sales in the tire industry, a such, as commercial, is there not?

A. The classification as between wholesale and retail, as applied to tire dealers, does not draw a line as to the commercial sales, that is, does not segregate commercial sales and throw in the wholesale, as far as I have been able to determine. It throws all those in retail and has classified them as retail sales. The wholesale sales were for resale purposes pretty generally, as a means of classification of tire accounts—in other words, the wholesale business was one that was doing fifty percent or more of its volume in wholesale.

Q. Well, what I meant, this is not—it is not a theoretical thing, then, talking about a commercial sale?

A. No, there is a distinction in the account, no doubt on that score.

Mr. Ray: That is all.

Mr. Mitchell: No questions.

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